87-2040

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, et al.,
Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, et al.,

and

RITENOUR SCHOOL DISTRICT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Under *Ex parte Young*, what Eleventh Amendment constraints limit a federal court's authority?

A. May a federal court order a state to reimburse a political subdivision for all or any percentage of the subdivision's cost of compliance with an injunction, in the absence of a substantive remedial obligation imposed upon a state official?

B. May a federal court order a state official to perform some action beyond his authority and competence under state law, when there are local officials who possess the authority to perform the substantive actions required by the court's order?

2. Assuming a federal court may order a state to reimburse, either partially or totally, a political subdivision for costs of compliance with an injunction, may a federal court, consistently with the Eleventh Amendment, order a state to make a monetary award to a political subdivision of the state (1) which is retroactive; (2) which exceeds the subdivision's actual costs of implementing the remedial decrees of the court or (3) when the services being provided by the subdivision exceed constitutional minimum standards?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings below were the petitioner State of Missouri, and its officials, The Honorable John Ashcroft, Governor of the State of Missouri, The Honorable William L. Webster, the Attorney General of Missouri, The Honorable Wendell Bailey, the Treasurer of Missouri, Dr. Robert Bartman, the Missouri State Commissioner of Education, John Pelzer, the Missouri Commissioner of Administration, and the Missouri State Board of Education: Roseann Bently, Dan L. Blackwell, Terry A. Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McCallister, Jr., Cynthia B. Thompson and Roger L. Tolliver.

Parties below and respondents before this Court are the Ritenour School District, the Rockwood School District. Amicus below was the Parkway School District.

Plaintiffs in the underlying litigation are:

1. Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel Yarber, her father and next friend, and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri.

2. Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People,

Co-defendant is Board of Education of the City of St. Louis.

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The opinion of the court of appeals is reported at 838 F.2d 308. The opinion is reprinted as Appendix B in the separate appendix to this petition. The opinions of the District Court are unreported but are reprinted as Appendices C, D and E of the separate appendix.

JURISDICTION

The State of Missouri, and certain of its agencies and officials, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1343 (3) and (4).

The opinion of the court of appeals was entered on February 4, 1988. Rehearing and rehearing en banc were denied on March 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant Constitutional provision involved in this case is the Eleventh Amendment which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATEMENT OF THE CASE

This case arises out of the context of desegregation litigation, but it is not a case about desegregation. The issues raised in this petition have nothing to do with whether desegregation shall occur in St. Louis, or how it will occur. The issues to be resolved here involve

the extent of federal court jurisdiction and power over state and local finances and the parameters of the Eleventh Amendment. We are here concerned about the constitutional limits on the lower federal courts to restructure the internal relations of a state and its political subdivisions.

This case involves an order, requiring the State of Missouri to pay the costs of constructing schools, adding rooms or reopening closed schools incurred by two school districts of St. Louis County, allegedly necessitated by the transfer of students from the City of St. Louis to suburban districts pursuant to a plan to remedy a past constitutional violation. Although this case orders reimbursement to only two school districts, there are five other pending requests totalling $31 million, and still more are likely.

This case has had a long history, touched upon only lightly in the Court of Appeals opinion. See *Liddell v. Board of Education of the City of St. Louis*, 839 F.2d 400 (8th Cir. 1988). A brief review is necessary in order to understand the order at issue in this petition.

In 1972 a group of plaintiffs filed this action on behalf of black students in the St. Louis schools charging that the Board of Education of the City of St. Louis (the "City Board") had "effected and perpetuated racial segregation and discrimination" in its schools. Neither the State of Missouri nor any State officials were originally named as defendants. In 1977, the State of Missouri, the Missouri State Board of Education, and the State Commissioner of Education were made parties defendant. See *Liddell v. Board of Education of the City of St. Louis*, 469 F.Supp. 1304, 1312 (E.D.Mo. 1979). The case was tried to the Court in 1977. The district court denied

plaintiffs any relief, specifically finding that the State of Missouri had "effectively removed all barriers at the State level to the desegregation of the schools." *Liddell*, 469 F.Supp. at 1314.

The Eighth Circuit Court of Appeals, sitting *en banc*, reversed. *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980). After reviewing the evidence, the Court of Appeals found that not only had the City Board's 1954 desegregation plan intentionally maintained segregated schools, but that the City Board had engaged in independent segregative acts after 1956. *Id.* at 1286-1291. The case was remanded to the district for further proceedings. On remand other State officials (the Governor, Attorney General, Treasurer and Commissioner of Administration) were added as defendants. The district court found that the State defendants had "abdicated their affirmative remedial duty." *Liddell v. Board of Education of the City of St. Louis, Missouri*, 491 F.Supp. 351, 359 (E.D.Mo. 1980). The district court approved a desegregation plan calling for student reassignments, magnet schools and remedial programs in the remaining predominantly black schools. The costs of this plan were divided equally between the City Board and the State of Missouri. *Id.* at 356-357. The district court has, ever since, simply ordered the Treasurer and the Commissioner of Administration to issue checks, payable by the State, to the City Board to cover whatever it determines the State's share of costs to be.

At this same time, the City Board, apparently realizing that extraordinary State funding would be available to it under a desegregation remedy, filed a new complaint, as did the plaintiff groups, against the State and certain of the independent suburban school districts in St. Louis County. Although these complaints were filed under

the existing case number, the interdistrict claims were severed and the district court scheduled hearings to determine whether any interdistrict violation had occurred. The hearings were never held and no determination of an interdistrict violation was ever adjudicated. The suburban school boards, plaintiffs and St. Louis City Board entered into a settlement agreement which by its terms was intended to settle the litigation regarding "plaintiffs' interdistrict claims." See Appendix G, A137. The State of Missouri was *not* a signatory to this agreement and the agreement was contingent upon the district court ordering the State of Missouri to pay those expenses the signatories had agreed (without the State's consent) that the State should reimburse. The Eighth Circuit affirmed the district court's order approving the settlement plan with certain exceptions. See *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984), Appendix F. The provisions of this settlement agreement call for the State to fund 100% of the cost of voluntary interdistrict transfers from city schools to suburban districts. This includes transportation as well as reimbursement of the suburban districts' alleged costs of accepting transfer students, based upon their average per pupil cost, rather than their incremental costs caused by the transfer students. The State is also required to pay the City Board one-half of the State aid which would be attributable to the transfer students, even though the City Board no longer educates them. In addition the State is required to pay a share of the cost of teacher exchanges, student recruitment, quality education programs, and the subject of this petition, "one-time extraordinary costs, such as the costs of reopening a closed school."[1] This

1. The total cost to the State for the last fiscal year was approximately $79.6 million and for the current fiscal year it is estimated to be $102 million.

provision has been interpreted by both the District Court and Court of Appeals as requiring the State not only to fund the costs of reopening closed schools in the suburban districts, but to pay the costs of substantial new construction.

The Ritenour School District ("Ritenour") and the Rockwood School District ("Rockwood") are two of the signatories to the settlement agreement, and two political subdivisions of the State of Missouri. Ritenour requested reimbursement from the State for some of the costs of reopening a closed elementary school, claiming that it needed additional classroom space due to its acceptance of transfer students from the St. Louis school district.

The Eighth Circuit approved Ritenour's request and held the State liable for a percentage of the costs of reopening the closed school. The State's share was to be determined by dividing the total number of elementary transfers (273) by the enrollment of the building (500). The total cost of the project $587,000, included amounts already expended by the district prior to making its request.

Rockwood school district sought cash reimbursment from the State for the construction of additional classrooms allegedly needed to house transfer students. The district court denied that request for reasons not relevant to this petition. The Eighth Circuit reversed this part of the district court order and held that county districts could request reimbursement for costs that were non-recurring in nature an unlimited number of times.

The ultimate effect of the order which is the subject of this petition is that the State will be required to reimburse 100% of the money expended by the county districts allegedly needed to enable them to house transfer students from the City. The City Board, whose students are being housed, will not be required to fund any part

of the cost of these capital expenditures. Additionally, the county districts will be able to determine how much space they need because under the Eighth Circuit's decision, they are apparently free to set their pupil/teacher ratios, a major determinant of the amount of space a district has available to house interdistrict transfer students, at whatever level they choose. Thus a district could set its pupil-teacher ratio below the level required by the Court for the St. Louis school district, where the constitutional violation occurred and determine its space needs and the funding obligation of the taxpayers at large of the State, on that basis. The Eighth Circuit has thus imposed very few limits on the amounts of money a political subdivision might receive as reimbursement from the State in order to meet self-imposed obligations.

No interdistrict constitutional desegregation violation for the St. Louis metropolitan area has ever been adjudicated. The State of Missouri was not a party to the agreement whereby suburban school districts agreed to participate in a voluntary remedy on the condition that the State would bear all costs of compliance. In effect, the Eighth Circuit, in this specific case, ruled in favor of two political subdivisions upon monetary claims against the State.

REASONS FOR GRANTING THE PETITION

A. The Opinion of the Court of Appeals Below, Imposing a Financial Liability Upon the State of Missouri, Without at the Same Time Imposing Appropriate Injunctive Relief Against Named State Officials, Violates the Eleventh Amendment to the United States Constitution, and Is in Conflict With an Opinion of the Court of Appeals for the Sixth Circuit.

The instant case and a recent decision of the Sixth Circuit Court of Appeals present dramatically conflicting

views of a state's immunity under the Eleventh Amendment to the United States Constitution. On the one hand, the United States Court of Appeals for the Eighth Circuit has repeatedly upheld the consistent practice of the District Court for the Eastern District of Missouri to order the State of Missouri to pay money to local school districts to implement a desegregation remedy without any substantive injunctive relief being entered regarding the conduct of any state-level official. The most recent of these decisions is *Liddell v. Board of Education of the City of St. Louis, Missouri*, 839 F.2d 400 (8th Cir. 1988). The substantive injunctive relief ordered by the District Court is imposed only upon the St. Louis School District and its officials.

The particular aspect of the remedy which was the subject of the Eighth Circuit's most recent opinion was the construction or re-opening of classroom space in school districts accepting transfer students from the St. Louis City district. The construction or re-opening of these classrooms would actually be done by or under the supervision of the districts and their officials. The state's only responsibility would be to pay 100% of those capital costs determined to be necessary for desegregation purposes.[2]

On the other hand, the United States Court of Appeals for the Sixth Circuit has held that such a naked order to pay, in the absence of any injunctive relief against a state official, is violative of the Eleventh Amendment

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2. Other aspects of the desegregation remedy follow a similar pattern. The educational components, such as magnet schools or remedial programs, are developed and provided by the St. Louis City School District. The State's only responsibility is to fund that percentage of the costs ordered by the court. The educational programs in those St. Louis County districts accepting transfers are likewise under the control of those districts. The State's only responsibility is to pay those districts pursuant to the Court's orders.

because the monetary liability so imposed is not a mere ancillary effect of any substantive obligations imposed by a federal court. *Kelley v. Metropolitan County Board of Education of Nashville*, 836 F.2d 986 (6th Cir. 1987). Petitioners believe that the Sixth Circuit's approach is correct and is fully consistent with this Court's prior decisions on the Eleventh Amendment which hold that the amendment forbids suits seeking to impose "a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

This case arises out of the desegregation suit involving the City of St. Louis, Missouri. The named state-level defendants include (in their official capacity) the Governor, the Attorney General, the Treasurer, the Commissioner of Administration, the Commissioner of Education, and members of the State Board of Education. The consistent policy of the District Court, with the approval of the Court of Appeals, has been to order certain programs to be implemented by the St. Louis School District and its officials to remedy the continuing of effects of past de jure segregation, approve a budget for such programs and order the State to pay to the relevant school district a certain share of the budgeted costs (ranging from 50% to 100%). At no time have any of the aforesaid state-level officials been enjoined to do anything except to pay money. Yearly budgetary orders directed exclusively to the Treasurer and the Commissioner of Administration order them to take the necessary steps to issue checks in the name of the State of Missouri. Similarly, districts in St. Louis County accept transfer students from the City and the State is merely ordered to pay the alleged costs thereof.

Although the recent opinion of the Eighth Circuit, as well as the recent decision of the Sixth Circuit, arise in desegregation cases, the issue is one of Eleventh Amend-

ment principles and is by no means limited to such cases.[3] The heart of the issue presented herein is whether the Eleventh Amendment to the United States Constitution allows a federal court to bypass or circumvent a state's organizational structure in formulating relief and, in the process, impose direct monetary liability upon a state. An example may best illustrate the question presented.

It goes virtually without saying that under *Ex parte Young*, 209 U.S. 123 (1908), a federal court may enjoin a state official to conform his conduct to federal law. Thus, a federal court could clearly order state correctional officials to reduce the population in a state penal institution which the court has determined to be overcrowded to such an extent that it is in violation of the Eighth Amendment to the United States Constitution. Compliance with such an order may or may not entail additional costs to the state. The state might build a new prison or it might simply grant prisoners an early release. But even if the state chose the former course of action, the monetary costs associated with new prison construction would not render the order violative of the Eleventh Amendment. Such a cost would merely be an ancillary effect of the state official's compliance with the substantive obligation to reduce the prison population to meet Eighth Amendment standards.

If, however, the overcrowding is in a county jail, and under the laws of the state, county jails are within

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3. For purposes of this petition, we assume that the substantive relief ordered (transfers of students, quality education programs, and magnet schools) are all remedial within the meaning of *Milliken v. Bradley*, 433 U.S. 267 (1977), i.e., that they are necessary to prospectively provide equal education services to all students of the school district, and not merely to achieve a level of education services deemed appropriate by a federal court, however much the comparative costs of the "remedial" programs in this case and *Milliken* belies that assumption.

the province of county government, is it permissible to order the state to pay money to the county in order to correct the situation? Assuming no state-level officer has the *duty* to maintain or operate county jails, there could be no substantive injunctive relief against a state official which would correct the situation. Any court imposed duty of the state to pay money to the county, therefore, is *not* a necessary consequence of any duty of the state official to conform *his* conduct to federal requirements. See *Libby v. Marshall*, 653 F.Supp. 359 (D.Mass. 1986) where just such relief was ordered.

Contrast that situation to one in which state officials were ordered to transfer convicted felons from the county jail to a state facility within thirty days of conviction, in order to relieve overcrowding at the jail. *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984). Although the court's conclusion that such an order was not inconsistent with this Court's opinion in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984)[4] is questionable, the order at least directed the state officials to take some action which was within their authority and competence under state law, rather than merely ordering them to pay money to correct a situation under local control. The petitioners submit that such a solely monetary award violates the Eleventh Amendment and that is the question presented herein.

Although there has been some confusion in the lower courts, it is clear from this Court's opinions that the dividing line of permissible relief under the Eleventh Amendment is not solely between damages and equitable relief. "The Eleventh Amendment by its terms clearly

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4. The duty to incarcerate convicted felons arose under state law.

applies to a suit seeking an injunction, a remedy available only from equity." *Cory v. White,* 457 U.S. 85, 91 (1982). "This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State School and Hospital v. Halderman, supra,* at 100. Both prospective and retrospective relief implicate Eleventh Amendment concerns. *Green v. Mansour,* 474 U.S. 64 (1985). Thus, while the Eleventh Amendment clearly bars suits against states seeking money damages, those are not the only suits so barred. *Cory v. White, supra,* at 90, n.2. Thus, merely labeling relief as prospective as did the Eighth Circuit Court of Appeals below, does not constitute an adequate analysis of Eleventh Amendment concerns in suits when a state is the real party in interest.[5]

However, an important exception has been recognized to this general principle. In *Ex parte Young, supra,* at 159-160 this Court held that a suit challenging the constitutionality of a state official's "individual conduct" is not one against the state and, therefore, is not prohibited by the Eleventh Amendment.

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5. There can be no doubt that the State is "the real, substantial party in interest." *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 465 (1945). Despite the fact that the orders are directed to the Treasurer and the Commissioner of Administration, they result in the payment of millions of dollars from the State Treasury.

The State is also a non-consenting party for Eleventh Amendment purposes. Although the myriad opinions below are replete with references to the "settlement agreement" or the "settlement plan," the State was not a signatory to any settlement. In 1983, the two plaintiff groups, the St. Louis School Board and the school districts of St. Louis County entered into an agreement settling the then pending claims for interdistrict relief. The State was not a party to that agreement and the consent of the suburban districts to participate by accepting transfer students from St. Louis City was contingent

(Continued on following page)

Thus, courts indulge in the fiction that even though a state official's actions may be expressly authorized by state law, if that authorization is unconstitutional, then the action is simply not that of the state. This presents the "well-recognized irony" that there is state action for Fourteenth Amendment purposes, but not for Eleventh Amendment purposes. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982). Petitioners submit, however, that this exception is necessarily narrow and limited to that which is necessary to vindicate the "supreme authority of the United States." *Ex parte Young, supra* at 160. The state official may be ordered, either affirmatively or negatively, to conform his conduct to federal standards. Fiscal consequences arising from such an order do not invalidate the injunctive relief under the Eleventh Amendment. This is fully explained in this Court's opinion in *Edelman v. Jordan, supra*, at 667:

> The injunction issued in *Ex parte Young* was not totally without effect on the state's revenues, since

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Footnote continued—

upon the court ordering the State to reimburse them at the rates specified in the agreement. This the District Court did. The funding order against the State was affirmed in part, and reversed in part, by the Eighth Circuit Court of Appeals. *Liddell v. State of Missouri*, 731 F.2d 1294 (1984). The Court struck down those parts of the order requiring funding of purely interdistrict relief because there had been no finding of an interdistrict violation, nor consent on the part of the State. The State funding for transfer of students between the city and the county districts was upheld on the theory that such transfers were remedying the intradistrict violation within the City of St. Louis, for which the State and the St. Louis City School Board had been found jointly liable. *Id.* at 1309. Thus, while this agreement may have settled the interdistrict claims as between the plaintiffs, the St. Louis City School Board and suburban districts, it settled nothing vis a vis the State. The State of Missouri, therefore, remains a nonconsenting party for purposes of the Eleventh Amendment analysis.

> the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits aid to welfare recipients without prior hearing. *But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms, were prospective in nature.* State officials, in order to shape their official conduct to the mandate of the court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.* [Emphasis supplied.]

But the fiscal consequences in these cases were not, as far as the state officials were concerned, the sole or even the primary relief. Indeed, it is arguable whether the fiscal consequences were even a *necessary* aspect of the relief granted. Thus, although the state in *Young* could not collect a certain tax, it could impose a new tax or increase rates of other taxes to offset the loss of income.

Similarly, although the state may not discriminate in providing welfare benefits, the state remains free not to provide welfare at all or to adjust benefits levels for all classes of recipients. Whether a state pursues such alternatives in order to avoid increased expenditures would be its own decision. This demonstrates, however, that the fiscal consequences, if they exist, are not necessary to insure compliance with federal law, they are mere ancillary effects.

In contrast, the role of the Missouri officials (actually only the Treasurer and Commissioner of Administration) is solely to monetarily compensate local school districts for their participation in either a court ordered remedy or a voluntary interdistrict remedy. The obligation of the State of Missouri to pay is not ancillary to any other duty imposed upon any state official by the courts. "The effect on the state treasury of the order entered by the district court in the case at bar is not 'ancillary' to anything at all . . . the order to pay is ancillary only to itself, . . ." *Kelley v. Metropolitan County Bd. of Education of Nashville, supra*, at 992. The lack of substantive injunctive relief at the state level, the Sixth Circuit Court of Appeals concluded, distinguishes such an order from that upheld in *Milliken v. Bradley, supra*. The Sixth Circuit noted that in its prior opinion in *Milliken*, it had specifically pointed out that the district court in that case had directed the Detroit Board of Education and the State of Michigan to jointly initiate certain programs. *Milliken v. Bradley*, 540 F.2d 229, 240 (6th Cir. 1976). This same aspect of the order was noted by this Court in *Milliken v. Bradley, supra* at 276-277. *Young, Edelman*, and *Milliken* can be reconciled only by concluding that a federal court order having a fiscal impact upon the state treasury is permissible only when a substantive obligation has been

imposed upon a state official which requires him to conform his conduct to federal law. Even when such an appropriate injunction is entered against a state official, petitioners submit that the Eleventh Amendment does not permit as part thereof, a direct order to the state official to pay any particular sum of money. Under *Edelman v. Jordan*, *supra*, it would appear that the payment of money is simply a consequence of the official's performance of the substantive obligations imposed and not a part of the relief itself.

The requirement of substantive, injunctive relief as a necessary prerequisite to any permissible fiscal consequences is not simply a technicality under the Eleventh Amendment. In other words, the petitioners believe that the Eleventh Amendment concerns could not be remedied by the courts below simply ordering the Governer or the Commissioner of Education to construct new schools for the school districts of St. Louis County. Such construction is simply not within their authority and competence under state law and petitioners submit that an important, although often unstated, aspect of the Eleventh Amendment is a respect for and adherence to a state's method of organizing and delegating its sovereign power. As this Court stated in *Ex parte Ayers*, 123 U.S. 443, 505-506 (1887):

> It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to

> and controlled by the mandates of judicial tribunals, without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment, requires that it should be interpreted, not literally and too narrowly, but fairly and with such breadth and largeness as effectually to accomplish the substance of its purpose.
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> * * *
>
> But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation of the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officials in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest.

Thus, it is apparent that a basic protection afforded by the Eleventh Amendment is a state's ability to administer its own "public affairs" and that the exception for unconstitutional conduct of a state official is limited to arresting or directing the official action of the state officer. An important aspect of this Court's opinion in *Ex parte Young* was whether the Attorney General of Minnesota had some official connection with the enforcement of the tax statute at issue. This Court concluded that:

> . . . it is plain that such officer must have some connection with the enforcement of the act or else

> it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Id. at 157. In the course of the Court's analysis in *Young*, this Court referred to the opinion of *Fitts v. McGhee*, 172 U.S. 516 (1899), in which this Court had stated:

> In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.

Id. at 530.

Since an *Ex parte Young* type suit against a state official is limited to controlling (by arresting or directing)

the official's conduct, petitioners submit that the Eleventh Amendment proscribes a federal court attempting to ignore or circumvent state law as it relates to that official's duties or responsibilities. To do so would create another curious "irony". This Court has traditionally held that suits against an official are permitted not only when it is alleged the official is acting unconstitutionally but when he is acting *ultra vires*, i.e., "conduct undertaken without any authority whatever." *Florida Dept. of State v. Treasure Salvors, Inc.*, *supra* at 697. Although the continued vitality of the *ultra vires* doctrine has been questioned it has not been specifically overruled. See, *Pennhurst State School and Hospital v. Halderman*, *supra* at p. 114, n.25. It would be ironic indeed if acting without authority under state law rendered an official subject to suit without violating the Eleventh Amendment, and yet at the same time, a federal court could order that same official to undertake a similarly unauthorized action.

It should be noted that this is not an instance in which there is not an official, agency or subdivision which could be ordered to perform the substantive remedial actions. Direct educational services, to the extent they are an appropriate remedy, have long been delegated by the State of Missouri to local school districts. Overriding that delegation would run afoul of the Eleventh Amendment. As stated by the Sixth Circuit Court of Appeals in *Kelley v. Metropolitan County Bd. of Education of Nashville*, *supra* at 994:

> Although the state may still have an affirmative obligation to see that the lingering effects of de jure segregation are eliminated, the existence of such an obligation does not compel either the conclusion that

> the state must discharge the obligation directly or the conclusion that the state may assign to its subdivisions no more than 40% of the cost of discharging it. "Municipal corporations [and metropolitan school boards] are political subdivisions of the state," after all, "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them." *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). In *Brown II*, 349 U.S. 294 (1955), the supreme court "held that the primary responsibility for abolishing the system of segregated schools would rest with the local school authorities." *United States v. Montgomery County Bd. of Education*, 395 U.S. 225, 226 (1969). If the State of Tennessee has chosen to let local school boards pull the laboring oar in attempting to eliminate the consequences of segregation, that is no more an evasion of state responsibility than if the state had chosen to act solely through the State Department of Education.

It was these basic premises which led the Sixth Circuit to reach a decision in conflict with the Eighth Circuit. The Sixth Circuit concluded that a federal court order which effectively held that no more than a certain percentage of the costs of implementing a desegregation remedy could be locally financed was a violation of the Eleventh Amendment. Such a federal court order would require that the duty to eliminate any constitutional violation be discharged through taxes levied at the state level rather than through taxes levied by the political subdivision. *Id.* at 998. When the decision to impose a tax burden at the state level had not been made by the elected representatives of the State as a whole, a

judicially imposed apportionment of this nature exceeds the authority of the federal courts in the view of the Sixth Circuit. The Eighth Circuit, on the other hand, held it has the authority to judicially impose such an apportionment in the order from which review is being sought. This dispute over federal judicial authority extends beyond school districts and desegregation. It applies to any political subdivision and any geographically localized constitutional violation.

This Court has historically avoided disputes between states and political subdivisions. "[A] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933). This principle dates back to *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). As explained in *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923), this Court in *Dartmouth College* held that:

> . . . the United States Constitution does not concern itself with matters of internal disagreements between a state and subdivisions created by it or between subdivisions created by the same state, for this area involves matters which the State is uniquely competent to resolve.

The district court and Eighth Circuit, however, have intruded in this basic area of state/local relations and in the process assumed a legislative role "for which the Court lacks both authority and competence," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 31 (1973) and deprived "the people of control of schools

through their elected representatives." *Milliken v. Bradley*, 418 U.S. 717, 743-44 (1974).

The soundness of this Court's policy is demonstrated in the instant case. When a political subdivision sues its creator state in an attempt to require the taxpayers at large of a state to pay money to that political subdivision, one group of citizens of a state is pitted against another. The political processes of the state are implicated in the most fundamental sense. This is not an appropriate conflict for a federal court to resolve.[6]

As noted above, there was a direct remedial order entered against the state of Michigan in *Milliken v. Bradley, supra*. It seems to have been assumed (certainly there was no discussion of the point) that this was a permissible order to be directed to state level officials. The instant petition presents two questions. First, was the substantive relief imposed upon the State of Michigan in *Milliken* a necessary prerequisite to the imposition of a fiscal obligation upon the State. Second, may a federal court order a state official to perform some action which he is not authorized to do under state law, when there exist, under state law, officials who may perform such actions. These are significant questions of Eleventh Amendment law and already a divergence of approaches has developed between the Sixth Circuit and the Eighth Circuit. Petitioners request, therefore, that this Court grant its writ of certiorari in order to decide these questions.

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6. This case is not analogous to those rare circumstances where a subdivision is allowed to sue a state over some state action preventing the subdivision from complying with federal law. *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). The State of Missouri has never been found to have barred or impeded any school district from complying with any desegregation obligation. Cf. *Milliken v. Bradley, supra*.

B. The Opinion Below Is Contrary to Controlling Decisions of This Court Interpreting the Eleventh Amendment to the United States Constitution in That It Requires a State to Pay Funds to Remedy a Past Constitutional Violation Without a Finding That the State Will Be Required to Pay Only the Actual Cost of that Corrective Measure.

Assuming that it is permissible to impose upon a State a financial liability designed to reimburse political subdivisions for the costs of their compliance with substantive remedial decrees, are there any Eleventh Amendment limitations upon the imposition of such monetary liability? The petitioners submit, not only that there are Eleventh Amendment limitations on such relief, but that those limitations have been exceeded by the courts below. First, consistent with this Court's opinion in *Edelman*, a reimbursement order against a state may not be retroactive. Second, as outlined in Part A, the exception permitted by *Ex parte Young* is narrow and designed only to allow a federal court to require a state official to conform his conduct to federal law. To the extent that direct financial responsibility may be placed upon the State it must likewise be narrowly limited to only that amount which is necessary to conform to federal requirements. To the extent that a political subdivision receives more than its actual costs of compliance, it has made a profit, and the excess cost paid by the State was completely unnecessary to achieve compliance. Even if the reimbursement is limited to actual costs, to the extent that a State is reimbursing a political subdivision for providing a service which exceeds constitutional minimums, the Eleventh Amendment is violated because the State is indirectly being required to provide a service beyond that which the court could order directly.

In the opinion from which review is sought, the Eighth Circuit (1) allowed a retroactive reimbursement by the State for previous repairs made by a suburban district; (2) required State reimbursement without any factual determination that other monetary awards previously paid by the State to the county districts are not sufficient to cover costs for the proposed capital projects; (3) permitted a district to obtain a capital asset with a useful life which will be in excess of the time the asset will be required as a component of the remedy; and (4) allowed the need for additional school space in county school districts to be determined based upon a district's pupil to teacher rate for its own schools even though that rate calls for fewer pupils per teacher than the State's AAA standards, which the Eighth Circuit has held to be the standard applicable to the integrated schools in the City of St. Louis where the adjudicated constitutional violation occurred.

Turning first to the question of retroactive reimbursement, Ritenour expended $47,000 for roof repair on a school which they only proposed to be reopened for desegregation purposes after the roof repair was completed. The State submitted to the Eighth Circuit that granting Ritenour's request for reimbursement of expenses already incurred prior to its submission to the District Court constituted the type of retroactive compensation which is barred by the Eleventh Amendment to the United States Constitution. *Edelman v. Jordan*, *supra*. The Eighth Circuit's opinion rejected that argument apparently believing that any monetary relief against the State if labelled remedial, was allowable. *Liddell*, 839 F.2d at 400.

The State submits that simply noting that the instant case is in the remedial stage is not dispositive of the Eleventh Amendment issue. Many Eleventh Amendment issues arise in the remedial phase of litigation, as did *Edelman v. Jordan*. In *Edelman*, the Seventh Circuit ordered not only that the State make proper welfare payments in the future, but also that it prospectively make payments of the amounts it had previously wrongfully withheld. This Court reversed and held that such relief was barred by the Eleventh Amendment because whatever label was applied to it, the relief was indistinguishable from an award of damages since the State was not under any court-imposed obligations to pay those welfare benefits prior to the time the District Court entered its order. Similarly, in the *Liddell* case, the State is under no general obligation to pay for any capital expenses incurred by a suburban school district. This Court has regularly rebuffed efforts to convert prohibited "retroactive relief" into "prospective relief" for purposes of evading the Eleventh Amendment. In addition to *Edelman*, this Court has refused to approve, on Eleventh Amendment grounds, an order requiring notice of administrative remedies for lost benefits, *Green v. Mansour*, 474 U.S. 64, 73 (1985), and an order requiring future restoration of income from depleted trust assets. *Papasan v. Allain*, 106 S.Ct. 2932 (1986). The retroactive reimbursement approved by the Eighth Circuit is a similar circumvention of the Eleventh Amendment.

In addition, the Eleventh Amendment is also violated because these financial awards from the State to the suburban districts result in an overpayment of their actual costs. It does not matter that the settlement agreement

may provide for State reimbursement in these particular amounts. Not being a signatory to the agreement, the State is not bound by that document, but rather is bound by Court orders. No matter what the settlement agreement itself provides, any funding orders obligating the State are subject to the limitations of the Eleventh Amendment. A federal court cannot allow non-state parties to impose an obligation on the State which the federal court could not impose directly. To allow this would constitute another prohibited "end run" around the Eleventh Amendment.

Apart from reimbursement for capital projects the State has also been ordered to reimburse the county school districts for their alleged expenses in accepting transfer students. This "reimbursement" is calculated on the basis of a district's overall per pupil cost. Because this per pupil cost includes a district's fixed costs (those payable regardless of the enrollment) the State has long argued that the reimbursement formula grants a district more than the incremental costs necessitated by its acceptance of transfers. The State thus subsidizes a portion of a district's normal operation. The Eighth Circuit has affirmed that reimbursement formula without ever finding, as a factual matter, whether or not it exceeded the districts' actual costs for transfer students. Such a denial of due process would never have been countenanced if an individual were being required to pay damages.

When the requests for capital reimbursement were before the Court of Appeals, the State again raised its complaint about the reimbursement formula, arguing that any overpayments under the formula should be applied

to any State liability for capital projects. The State asked that the matter be remanded to the district court for purposes of holding an evidentiary hearing on the question. The request was ignored. The State does not believe that the Eighth Circuit or the District Court can continue to blindly follow the reimbursement formula without determining whether an overpayment exists. If there is an overpayment then not only is the formula itself constitutionally invalid but if that overpayment is allowed to stand, the orders of both the district court and the Eighth Circuit imposing a monetary liability on the State for capital costs are completely unnecessary to prospectively comply with a remedial decree. Such an award would be worse than a damage award, already disapproved by this Court, and would be indistinguishable from an award of punitive damages against a State, which this Court has never permitted.

Another aspect of the capital requests from these suburban districts which runs afoul of the Eleventh Amendment arises from the fact that the State is being asked, and will be asked in the future, to expend funds on capital assets for suburban districts which will have a useful life far longer than the period of time for which these assets will be needed as a component of the desegregation remedy. To the extent it can still be used as a school, a district may choose to do so without having to pass a bond issue on its own. If, on the other hand, it is no longer necessary to use the facility as a school, the school district may sell the asset and realize some financial benefit therefrom. Whatever scenario ensues, however, it is clear that the school district receives a financial windfall *at the expense of the State*. The State

believes that an apportionment principle, when purchasing long term capital assets for a political subdivision, is compelled by the Eleventh Amendment.

Another aspect of the problem relates not to the length of time a facility will be needed for remedial purposes, but to how much of the facility is needed for those purposes. The Eleventh Amendment is again violated to the extent the State is required to pay for a share of a capital asset which is greater than that necessary for remedial purposes. This scenario appears in the claim made by Ritenour school district for the reopening of Buder Elementary School, which was closed by the district several years ago. The Court of Appeals approved State reimbursement of a percentage of the cost of reopening, the percentage being the district's total number of elementary transfers divided by the capacity of the school. Although Buder has 22 elementary classrooms, with a capacity of 550, its reopening results in a net increase of only 9 classrooms for the district as a whole, because the district proposes to rededicate presently existing and available classroom space (representing capacity) to specialty uses such as computer rooms and gifted programs, which do not add to the capacity of a facility. Given the district's apparent desire to rededicate existing classroom space for its own educational reasons, and given the fact that Ritenour receives only approximately 273 elementary transfer students, it seems apparent that the district would have either wished to or needed to re-open Buder even if it had not accepted any transfer students at all. This would render the reopening unnecessary for the remedy and the State's share of the cost of reopening Buder should have been

zero. In any event, however, basing the State's liability on the total capacity rather than on the net increase in capacity requires the State to subsidize a portion of the district's general education program. This is not a necessary cost of prospective compliance with the transfer aspect of the remedy and runs afoul of the Eleventh Amendment.

A final matter constituting an overpayment in violation of the Eleventh Amendment, arises from the manner of calculating whether or not there is actually a need for additional space because of the influx of transfer students. In this regard, the State pointed out that both Ritenour and Rockwood School Districts have pupil-teacher ratios well below the State's AAA standards of 30 to 1. The Eighth Circuit has ruled that as a part of the remedy the State AAA standard for pupil-teacher ratios is the benchmark to be met in the integrated schools in the City of St. Louis. *Liddell v. Board of Education of the City of St. Louis*, 823 F.2d 1252, 1253 (8th Cir. 1987). A lower pupil-teacher ratio is not constitutionally required, even in the St. Louis City school district where the adjudicated violation took place. Now, however, the State is being directed to expend funds to assist suburban districts in maintaining pupil-teacher ratios well below those which the Court has held is constitutionally required. If the suburban districts accepted transfers until their pupil-teacher ratios were at the 30 to 1 level, they could accept thousands more students without the necessity for any additional space being constructed or reopened. In Rockwood alone, which has 239 elementary classrooms, increasing the pupil-teacher ratio at that level by only 2 pupils could result

in space for 478 additional elementary transfer students. This would still leave Rockwood below the State's elementary AAA standard of 30:1.

It is not suggested that a school district is without local discretion to maintain a low pupil-teacher ratio, but the taxpayers of the State as a whole should not be required to fund that decision. The construction of additional classroom space which is necessitated, if at all, only by the suburban districts' desire to maintain a lower pupil-teacher ratio, is not a cost of any *necessary* prospective compliance with any constitutional command. To the extent that the panel's opinion allows and approves State liability for such costs, it is in excess of the Court's authority under the Eleventh Amendment.[7]

As the examples above indicate, the opinion of the Eighth Circuit in this case is contrary to controlling decisions of this Court which forbid a federal court from requiring a state to pay more than the actual costs of any prospective remedy for a constitutional violation. This departure from previous Supreme Court precedent on a fundamental constitutional issue warrants this Court's review. Petitioners respectfully request this Court to grant its writ of certiorari.

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7. Obviously, the amount of money spent by the State to reimburse relatively wealthy county districts takes away from the amount the State can provide to its many other school districts, many of which are in effect being penalized because they reached constitutional standards immediately after *Brown I* or shortly thereafter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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87-2040

No.

Supreme Court, U.S.
FILED
JUN 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, et al.,
Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, et al.,

and

RITENOUR SCHOOL DISTRICT,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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(Filed March 14, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2193EM

In Re: Craton Liddell, et al v. Board of Education of the City of St. Louis, Missouri, et al,

Ritenour School District,
Appellant,

vs.

The State of Missouri,
Appellee.

No. 86-2359

In Re: Craton Liddell, et al v. Board of Education of the City of St. Louis, Missouri, et al,

Rockwood School District,
Appellant,

vs.

The State of Missouri,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 14, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Filed February 4, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2193

In Re: Craton Liddell, et al. v. Board of Education of the City of St. Louis, Missouri, et al.

Ritenour School District,
Appellant,

v.

The State of Missouri,
Appellee.

Parkway School District,
Amicus.

No. 86-2359

In Re: Craton Liddell, et al. v. Board of Education of the City of St. Louis, Missouri, et al.

Rockwood School District,
Appellant,

v.

The State of Missouri,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 13, 1987
Filed: February 4, 1988

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

HEANEY, Circuit Judge.

Ritenour School District and Rockwood School District submitted requests to the district court for reimbursement by the State of Missouri for expenses incurred in accepting black transfer students from the City of St. Louis School District pursuant to the settlement plan in the St. Louis school desegregation case. The district court granted Ritenour partial payment and denied Rockwood's request. We affirm in part and reverse in part as to Ritenour, and reverse as to Rockwood.

BACKGROUND

In March, 1983, twenty-three county schools and the City of St. Louis School District entered into a settlement agreement with the plaintiffs in the St. Louis school desegregation case. This Court approved the settlement agreement and detailed a plan for the desegregation of the St. Louis schools. *See Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984) (*Liddell VII*). We found the State of Missouri to be a constitutional violator, *id.* at 1298-99, and held that it must, with certain exceptions, abide by the terms of the settlement agreement. *Id.* at 1309.

The settlement plan requires the voluntary interdistrict tranfer of black students from the City of St. Louis school system to the county school districts. The transfers serve two purposes: (1) to provide the transfer students

and the suburban students with an integrated education; and (2) to reduce the number of students in the St. Louis schools, particularly in the nonintegrated schools. The State is obligated to fund much of the interdistrict plan. *Id.* at 1301-09.

Liddell VII established that 15,000 black students from the city would be transferred to county schools over a period of years. Significant progress has been made toward that goal. The numbers of transfers has steadily climbed from 2,294 in 1983-84, see 731 F.2d at 1302, to almost 12,000 in the current school year. *See* Voluntary Interdistrict Coordinating Committee Report of November 4, 1987, at 10.

Both Ritenour and Rockwood have growing numbers of resident and transfer students.[1] Ritenour requests reimbursement from the State for some of the costs of reopening a closed elementary school. Rockwood requests reimbursement for the building of more classroom space to accommodate the transfer students.

ANALYSIS

In issue in this case is section X.B.3 of the settlement plan which provides for reimbursement for a county district's "one-time extraordinary costs (other than hiring of personnel) such as the costs associated with reopening a closed school." Both Ritenour and Rockwood claim that they are entitled to reimbursement under this section.

The State makes a number of arguments which apply to claims of both school districts.[2] It initially contends that

---

1. Rockwood had a total of 826 transfer students in 1985-86, and 1,426 in 1986-87.

2. The State concedes that it cannot seek to have the partial payment granted by the district court to Ritenour reduced, since it did not file an appeal or cross-appeal.

Ritenour and Rockwood are not entitled to any reimbursement by the State for capital expenditures for the reopening or the creation of classroom space to accommodate transfer students. It points to *Liddell VII* in which the Court en banc disapproved that portion of the settlement plan under which the county districts were to be reimbursed for capital costs for establishing county magnet schools. *See* 731 F.2d at 1312. It argues that the Court decided that reimbursements for capital expenditures in the county school districts were beyond the scope of the proper remedy. This argument is without merit.

The State must abide by the terms of the settlement plan. *See id.* at 1302-09. The Court en banc stated: "Interdistrict transfers between the city and the county schools may proceed pursuant to the settlement agreement," subject to certain exceptions. The Court did not except the State from paying the capital costs due to interdistrict transfers as directed in section X.B.3. *See id.* at 1309. *Liddell VII* therefore did not insulate the State from liability for capital costs to accommodate transfer students in the county schools.

Second, the State contends that the question of the need for additional space for transfer students should only be considered on the basis of the county as a whole. It argues that unless Ritenour and Rockwood can show that other county districts do not have space, their request to be reimbursed for the creation of additional space should be denied.

The settlement plan does not establish such a requirement. Nor does it limit transfer students to those districts which have existing space to accommodate them.[3] Instead,

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3. In fact, section I.A.1(d) of the settlement plan specifically notes that "[t]here is no 'space available' condition on interdistrict transfers under the proposed settlement."

it specifically permits districts to seek reimbursement for capital costs. In *Liddell VII*, we stated that "complementary zones" which would limit the choices of the schools which transferees could attend would undermine the voluntary nature of the settlement agreement. *See id.* at 1309. We view the State's present argument in a similar light. A requirement that a district cannot build to accommodate transfer students unless no other district has space would seriously limit the choices available to transfer students. We therefore reject the State's argument.

Third, the State contends that Ritenour and Rockwood are not short of space. It argues that Ritenour and Rockwood would be able to accommodate the additional transfer students by raising their pupil to teacher ratios. We will not require either school to take that action. It was not the intent of the settlement agreement or of this Court to require suburban schools to lower their standards as a condition of participating in the voluntary interdistrict desegregation plan.

Finally, the State contends that the per pupil reimbursements paid by the State under section X.B.1. of the settlement plan are sufficient to cover, not only the per pupil recurring costs, but also the costs of capital projects. We disagree.

Reimbursements for per pupil expenditures under section X.B.1. and reimbursements for one-time costs under section X.B.3. are distinct aspects of the settlement plan. The per pupil reimbursements under section X.B.1. are not in issue in this appeal. In any event, the record before this Court does not show that county districts are receiving reimbursements that are greater than their per pupil costs. In fact, Ritenour submitted evidence that in 1984-85, it received a per pupil reimbursement from the State of $2,270 but that its per pupil costs were $3,150.

We turn now to the individual budget requests of Ritenour and Rockwood.

A. Ritenour

Ritenour objects to the formula adopted by the district court for determining the amount the State should reimburse it for the reopening of Buder Elementary School. Ritenour estimated the cost of reopening this school to be $587,000. It asked the State to pay $290,565. The State refused. Thereafter, Ritenour filed a budget request. A hearing was set before the Budget Review Committee (BRC).

Ritenour submitted evidence that its elementary schools were overcrowded; that in the previous year it could not accept more transfers because of the overcrowding; and that over the last several years, Ritenour had been forced to convert speciality rooms into regular classrooms. According to the evidence, as of June, 1985, Ritenour's elementary schools exceeded their "preferred capacity" by 486 students. The State submitted no evidence in rebuttal.

On June 6, 1985, the BRC filed its final report and recommendation with the district court. The report agreed with Ritenour that Buder had to be reopened, in part because of transfer students; that the $587,000 estimate for renovating Buder was reasonable; and that "Ritenour has deligently abided by the Settlement Plan provisions in the recruitment, assignment and education of transfer students." The BRC, however, recommended that only $108,783 be paid to Ritenour.

The BRC arrived at this figure by deducting "non-capital costs" such as books and instructional materials;

by deducting funds which had been expended by the school district prior to approval by the district court; and by applying a special "proration factor." The "proration factor" was arrived at by dividing the number of additional transfer students in the coming school year by the total number of seats in Buder. Ritenour's estimates of the costs and the BRC's deductions from them break down as follows:

Proposed Expenditures (1986-87)	
Equipment and Furniture	$190,000
Repair and Renovation	190,000
Kitchen	44,000
Instructional Materials	40,000
Kitchen Exhaust System	15,000
Prior Expenditures (1985-86)	
Roof Work	47,000
Reading and Math	31,000
Library Starter Kits	30,000
Total Projected Cost of Reopening Buder -	$587,000
Deduct	
Recurring Operating Costs	43,865
Expenditures Made Prior to District Court Approval	108,000
Net Capital Cost	$435,135
Multiply by Cost Proration Factor of 25%	.25
	$108,783

We consider each of Ritenour's objections to the BRC's computation methods.

a. *Books and Instructional Materials*

Ritenour argues that section X.B.3. allows for reimbursement of some non-capital costs. It argues that the language of section X.B.3., "one-time extraordinary costs * * * associated with opening a closed school," includes all those items that must be in place and available for use when the closed school first reopens. The total amount paid or to be paid by Ritenour for the books and instructional materials for which it seeks reimbursement is $101,000.[4]

While we are not willing to conclude that "one-time extraordinary costs" can only embrace capital costs, we do not believe that Ritenour has demonstrated that the $101,000 paid for books and instructional materials are indeed "one-time extraordinary costs" which are not included in the yearly per pupil reimbursements. The definition of per pupil costs in section X.B.1.—"all costs for instruction and support services"—indicates that the per pupil reimbursements would cover the cost of the books and supplies. Absent some showing of different circumstances, payments for books and instructional materials are included in the per pupil reimbursements. We thus affirm the decision of the district court that Ritenour's budget request must be reduced by $101,000 or from $587,000 to $486,000.

b. *Pre-Request Expenditures*

Ritenour spent $47,000 to repair the roof of Buder school in the budget year prior to the one in which it

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4. This amount includes $71,000 for books and instructional materials, a cost which Ritenour had incurred in the prior budget year, 1985-86.

filed the budget request. According to Ritenour, these repairs prevented deterioration of the building and ultimately reduced the cost of reopening Buder.

The district court held that these expenditures should not be reimbursable because a request for expenses already incurred circumvents established procedures and practices. We disagree with this ruling.

Neither the State nor the district court points to a specific rule prohibiting reimbursement for an expenditure made prior to a request. Nor, can we find a valid reason for such a rule. Ritenour reduced the cost of the repair and ultimately the State's liability by making the repair. Frugality and foresight should be encouraged.

The State, citing *Edelman v. Jordan,* 415 U.S. 651 (1974), contends that reimbursement for past expenditures would constitute a form of retroactive compensation barred by the eleventh amendment. This argument is without merit.

The eleventh amendment bars a suit by private parties "seeking to impose a liability which must be paid from public funds in the state treasury." *Id.* at 663. "[A] wide range of prospective relief 'which serves to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury.'" *Denke v. South Dakota Dept. of Social Services,* 829 F.2d 688, 689 (8th Cir. 1987) (citing *Papasan v. Allain,* U.S. , , 106 S. Ct. 2932, 2940, 92 L.Ed.2d 209 (1986)); *see also Liddell VII,* 731 F.2d at 1308 n.13 (approving the district court's funding orders in this case). The relief in issue here is prospective. The St. Louis school desegregation case is in the remedial

stage. The failure of the State to pay Ritenour for the roof repair in question is not a past wrong for which Ritenour is attempting to hold the State liable. Rather it is a question of what the State must do *now* to conform its actions to the remedial relief already required. Thus, there is no eleventh amendment bar to this payment for past roof repairs.

c. *The "Proration Factor"*

Ritenour objects to the district court's use of the proration factor. Applying the proration factor, the district court allowed Ritenour reimbursement for only twenty-five percent of the capital costs for Buder. The district court observed that the State is only responsible for capital improvements necessary to the 12(c) plan. The district court viewed necessary expenses as including only the "additional capital expense incurred by Ritenour due to the admission of additional transfer students * * * (i.e., new elementary transferees for 1986-87)." The court estimated that about twenty-five of the students attending Buder would be transfer students.

The court recognized that all of the transfer students in the district contributed to the need for additional space. It presumed, however, that the students who had transferred prior to the 1986-87 school year were adequately accommodated, and thus only the additional transfer students and the growing number of resident students created the need for the reopening of Buder.

Ritenour argues that it should be reimbursed for fifty-five percent of its capital expenditure. The fifty-five percent payment was deemed necessary because

Buder would create five hundred new seats and 273 transfer students were expected to attend the elementary schools in the Ritenour district. Thus, 227, or forty-five percent of the new seats would essentially be to accommodate the growing number of resident students.

We find Ritenour's reasoning persuasive. First, as Ritenour observes, the proration factor used by the BRC has never been applied in any past funding request.[5] We see no good reason to adopt it now. In addition, as the Ritenour formula recognizes, the number of transfer students already in the district has a continuing effect on the space available in existing school buildings. It is the lack of space in existing buildings, due in part to the transfer students already there, which necessitates the creation of more space. As Ritenour correctly points out, any other method of computation would lead to arbitrary results.

Under Ritenour's approach, a district is not compensated for "one-time extraordinary costs" unless it must create more classroom space to accommodate transfer students. Thus, if a school has excess space, the district would not be reimbursed for allowing transfer students to use that space. When new space is required, however, those transfer students already in the district must be taken into account, since their presence would for the first time affect the district's building plans.

The State should therefore reimburse the district to the extent existing and newly transferred students cause the need for new space. We thus hold that the State

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5. In an order of December 10, 1984, the district court (Judge Hungate presiding) approved a request of Rockwood school for $425,000. The court approved the request in full without applying a proration factor.

should reimburse Ritenour for fifty-five percent of the capital costs, or $267,300 ($486,000 x .55) for the re-opening of Buder.

B. Rockwood

Rockwood appeals an order of the district court denying its request for reimbursement from the State for the construction of ten additional classrooms.

Rockwood made its first request under section X.B.3. in 1984. Judge Hungate approved that request. Rockwood made the present request on April 1, 1986. The district court denied the request because "the plain meaning" of "one-time extraordinary costs" is that a "county school district can seek state funding of desegregation-related capital expenditures only once."

The question of Rockood's request hinges on the meaning of "one-time" in the phrase "one-time extraordinary costs:" does it define the *kind* of costs (i.e., recurring versus non-recurring) which are reimbursable or does it define *the number of times* reimbursement can be sought? In our view, the district court erred in deciding that it limited the number of times reimbursement may be sought.

We start by observing that the district court essentially interprets the phrase to read that a district may seek reimbursement "only one-time for extraordinary costs." Such an interpretation, however, is not compelled by the language. To the contrary, a more reasonable interpretation is that one-time costs are those that do not recur on a regular basis, or put another way, costs for particular items whose useful life is, in theory, unlimited. *See, e.g., United States v. Board of Educ.*, 621 F. Supp. 1296, 1350 (D.C. Ill. 1985) (where the court notes in discussing a

budget matter "that certain of the items funded in school year 1983-84 are one-time costs and will not recur in subsequent years"), *vacated on other grounds,* 799 F.2d 281 (7th Cir. 1986). Such costs would be distinguishable from operational costs (such as salaries, supplies, and building maintenance) which recur on a regular basis.

In this case, the cost for the classrooms for which Rockwood sought reimbursement in 1984 are "one-time" costs in that those particular classrooms will not have to be replaced in the short-term. If Rockwood has to build more classrooms, the cost of those classrooms would be "one-time" in that the additional classrooms would also not have to be replaced in the short-term. In this way, both Rockwood's 1984 request and its present request would be for "one-time" costs.

The State contends that to read the phrase in such a fashion would render the term "extraordinary" superfluous. We disagree. First, we think that standing on its own, the term "extraordinary" as interpreted by the district court is unclear. The State argues that "extraordinary" costs refer to capital costs. This Court has examined a number of cases in which the term "extraordinary costs" is used, and in none of them is "extraordinary" synonomous with "capital." *See, e.g., Regents of Univ. of California v. Heckler,* 756 F.2d 1387, 1391 n.6 (9th Cir. 1985) (plaintiffs seeking "extraordinary costs associated with housekeeping and plant engineering"); *Nevada Power Co. v. Watt,* 711 F.2d 913, 921 (10th Cir. 1983) (federal environmental statute listing extraordinary costs as those of "special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities"); *Geneva Towers Tenants Org. v. Federal Mortgage Inves-*

tors, 504 F.2d 483, 497 n.6 (9th Cir. 1974) (using "extraordinary costs" in terms of unanticipated costs in a case involving federal housing legislation). While these cases by no means resolve the meaning of "extraordinary costs," they certainly cast doubt on the State's interpretation.

We believe a more reasonable interpretation would be this: "extraordinary" means those costs which are due, not to ordinary operation of a school district for its resident students, but are due to the presence of transfer students from outside the school district. Thus, the full phrase "one-time extraordinary costs" would mean those non-recurring costs incurred as a result of the presence of the transfer students.

In addition, this interpretation of the language of X.B.3. is more fiscally prudent than the interpretation offered by the State. Under the State's interpretation, Rockwood should have made a complete budget request in 1984 which would have anticipated all the future capital needs necessitated by the transfer students. Such a request, however, would have to have been based on projections of the growth of the resident population and the number of transfer students who might choose to come to the district. It could have turned out to be grossly inflated, and the State would have had to reimburse the district for expenditures not required by the settlement plan.

In most instances it would be far more prudent to expand incrementally to avoid wasting money on classroom space that might not be needed for transfer students. This is precisely what Rockwood did. Such an approach is consistent with both the letter and spirit of the settlement plan. We therefore hold that that the district court erred in refusing to consider Rockwood's second budget request under section X.B.3.

CONCLUSION

The district court did not err in rejecting Ritenour's request for reimbursement of $101,000 for books and instructional materials. It did, however, err in rejecting Ritenour's request for $267,300 to cover the capital costs in reopening Buder school, including the capital costs incurred in the year prior to Ritenour's budget request.

We reverse the district court's ruling regarding Rockwood's budget request. We remand the matter to the district court for reconsideration in light of this opinion.

A true copy.

Attest:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
Eighth Circuit

(Filed August 25, 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100 C (5)

CRATON LIDDELL, et al.,
Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MO., et al.,
Defendants.

ORDER

IT IS HEREBY ORDERED that Rockwood School District's budget request for capital expenditures, L(802) 86, be and is DENIED. It is this Court's finding that pursuant to the terms of the Settlement Agreement, Section X.B.3, the plain meaning of the language, "one-time extraordinary cost" means that a county school district can seek state funding of desegregation-related capital expenditures only once. Rockwood previously sought and was granted state funding for reopening 14 classrooms in 1984 (and, in fact, is still receiving state payments for that budget request). *See*, H(3512)84.

Dated this 25th day of August, 1986.

/s/ Stephen N. Limbaugh
United States District Judge

(Filed October 3, 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100 C (5)

CRATON LIDDELL, et al.,
Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MO., et al.,
Defendants.

ORDER

IT IS HEREBY ORDERED that Rockwood School District's Motion to Reconsider Order L(1039)86 regarding capital expenditures, L(1057)86, be and is DENIED. The Court has carefully reviewed Order L(1039)86, Rockwood's motion and responses thereto and finds no compelling reason to change its original decision.

Dated this 3rd day of October, 1986.

/s/ Stephen N. Limbaugh
United States District Judge

(Filed August 27, 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100 C (5)

CRATON LIDDELL, et al.,
Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MO., et al.,
Defendants.

ORDER

In accordance with the memorandum filed herein this date,

IT IS HEREBY ORDERED that Ritenour's budget request, L(794)86 be and is approved for the maximum total amount of One Hundred Eight Thousand Seven Hundred Eighty Three and no/100 Dollars ($108,783.00). This budget award is subject to modification as set forth in the accompanying memorandum.

IT IS FURTHER ORDERED that this budget award is to be funded by the State and that payment shall be tendered on or before June 30, 1987.

Dated this 27th day of August, 1986.

/s/ Stephen N. Limbaugh
United States District Judge

(Filed August 27, 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100 C (5)

CRATON LIDDELL, et al.,
Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MO., et al.,
Defendants.

MEMORANDUM

This matter is before the Court on a budget request submitted by the Ritenour School District. L(794)86. Ritenour seeks partial state funding of the costs associated with the reopening of Buder Elementary School. The Budget Review Committee (BRC) reviewed Ritenour's request and filed its report. L(929)86. Both the State defendants and Ritenour responded to the BRC report. L(969)86 and L(956)86, respectively. Although the Ritenour budget request really only concerns Ritenour and the State, other parties took an interest in the matter. Certain county school districts (i.e. Bayless, Brentwood, Clayton, and Hancock Place) filed a statement in support of Ritenour's response to the BRC report. L(959)86. Kirkwood School District has also recently

filed a memorandum in support of Ritenour's budget request. L(1036)86. City Board filed a reply to the State's response to the BRC report. L(997)86. City Board took objection to the State's contention that City Board should share equally in the cost of funding capital improvements for suburban districts. The State defendants then responded to the statement of support filed by the county school districts. L(994)86. The final comment on this matter was expressed in the county school districts' memorandum in opposition to the State defendant's response to the BRC report. L(1002)86.

Ritenour has requested partial state funding, pursuant to the Settlement Plan, §X.B.3, H(2217)83, of costs associated with the reopening of Buder Elementary School. Ritenour claims that "[t]he reopening of Buder is now required to accommodate the influx of desegregation transfer students into Ritenour pursuant to the 12(C) Settlement Plan, and is essential to enable Ritenour to meet its plan ratio and otherwise to satisfy its obligations under the Plan." (L(794)86 at 1. Ritenour anticipates a total elementary transfer enrollment of 273 students; 140 of these students will be new elementary transfer students for 1986-87. The projected enrollment at Buder (transfer and resident) will be 500 (although Buder has the capacity for 550 elementary students). Ritenour is limiting its budget request to $290,565.00 by using a 10% deduction for "questionable costs" and a 55% proration factor (ratio of anticipated total number of elementary transfer students for 1986-87 to expected enrollment at Buder). The $290,565.00 figure consists of pre-approval costs for reading and math materials, library starter kits, and roof work (disbursements made by Ritenour prior to submission of this funding request), and anticipated

expenditures for equipment, furniture, repairs, renovation, kitchen, instructional materials, and a kitchen exhaust system.

The formula used by Ritenour to compute its funding request is as follows:

Total projected cost for reopening Buder	$587,000.00
Reduce by 10 percent for "questionable" costs	58,700.00
	$528,300.00
Multiply remainder by 55 percent ($528,300 x .55)	$290,565.00
Derive proration percent by dividing the expected total 1986-87 transfer students (273) by the projected enrollment at Buder (500) (273 divided by 500 = .546 (percent)	55%

The total projected cost for reopening Buder was computed by Ritenour based upon the following cost itemization:

The following costs have already been incurred in preparation for the reopening of Buder School:

Reading & Math	$ 31,800.00
Library Starter Kits	30,000.00
Roof Work	47,000.00
TOTAL	$108,000.00

This amount when added to the budget included in the next two attachments will bring the estimated total expenditure to:

$108,000.00	Reading, Math, Library Kits & Roof Work
190,000.00	Equipment and Furniture
190,000.00	Repairs and Renovation
44,000.00	Kitchen
40,000.00	Instructional Materials
15,000.00	Kitchen Exhaust System
$587,000.00	Total Amount Ritenour has spent or budgeted to Buder Reopening

The State opines that it has absolutely no obligation under the Settlement Plan to fund desegregation-related capital improvements for county schools. It believes that Judge Hungate's order, H(3512)84, did not address the issue of State funding of desegregation-related capital improvements for county schools pursuant to the Settlement Plan, §X.B.3. Furthermore, the State alleges that Ritenour's request for capital improvements is not desegregation-related, but rather necessitated by an increasing resident population. Finally, the State advances the theory that host district incentives, foundation aid, and trust fund allocations should be utilized by Ritenour to defray the rehabilitation costs of Buder (if Ritenour believes re-opening Buder is truly necessitated by the influx of desegregation transfer students).

On the other hand, if the Court should approve Ritenour's request, the State believes that certain modifications are necessary. First, any budget amount should only include capital costs, and not noncapital costs (which are already reimbursed through pupil transfer payments). Second, any work completed or expenditures already made prior to the submission of this budget request to the BRC or approval by the Court should not be included in any

budget award. Third, both the City Board and the State should be required to fund any capital improvements budget award to Ritenour. Fourth, such a budget award is a one-time only award to Ritenour. Finally, the State computes the State's and City Board's liability to no more than $19,489.00, payable over five years at $4.92 per pupil per year.

The State's computation is as follows:

Kitchen equipment	$ 38,237.00
Repairs, renovation	190,000.00
Kitchen Exhaust System	15,000.00
	$243,237.00

State and City Board's liability: .3103 x .2581 x $243,237.00 = $19,489.00 (.3103 represents 9/29, the fraction indicating the net regular school classrooms which reopening Buder will produce; .2581 represents 142/550, the fraction indicating the portion of Buder's capacity necessitated by the 1986-87 new elementary transfer students).

The BRC unanimously approved adoption of the Chairperson's operational definition and the associated methodology regarding the calculation of one-time extraordinary costs in a proposed school reopening budget, under the terms of the Settlement Plan, §X.B.3. This operational definition and methodology provides that:

1) Only capital costs can be funded pursuant to X.B.3 because recurring operating expenses (i.e. non-capital costs) of a county school are already reimbursed by §X.B.1 (host district incentives).

2) Expenditures made before BRC analysis and Court approval should be deleted from the host district's total budgeted cost for reopening a school.

3) The net total capital cost of a school reopening project should be prorated. Proration should distinguish (out of total capital cost) that portion constituting additional capital outlay burden incurred by the host district in providing facilities to house additional transfer students.

4) The capital costs must be reasonable.

Using the aforementioned operational definition, the Chairperson determined the following to be recurring operating costs and thus not compensable:

Supplies:	
Art	$ 3,204.98
Paper	6,576.93
Physical education	2,641.35
Audio-visual	1,036.35
Office	3,574.47
Music	670.75
Clinic	316.00
Instructional materials:	
Dictionaries	$ 6,102.75
Pictionaries	611.15
Encyclopedias	6,495.00
Math duplicating kits	697.20
Kindergarten science	3,879.00
Kits and instructional materials	4,059.30
Libraries	4,000.69
Total Current Expenditures	$43,865.92

He also determined that $108,000.00 for expenditures made prior to BRC analysis and Court approval was not com-

pensable. These disbursements were: $31,800.00 for reading and math materials; $30,000.00 for library starter kits and $47,000.00 for roof work.

The Chairperson's final recommended budget amount for Ritenour was $108,783.00 payable by the State only in a single lump sum on or before June 30, 1987 (he further recommended modification of this amount depending upon whether or not Ritenour accepts 140 additional elementary transfer students in 1986-87). His recommended amount was computed as follows:

Total projected cost of reopening Buder	$587,000.00
Deduct recurring operating costs	-43,865.00
Deduct unilateral unapproved disbursements	-108,000.00
Net capital cost	$435,135.00
Multiply by cost proration factor (25%) ($435,135 x .25)	108,783.00
Derive cost proration factor by dividing the additional elementary students to be accepted in 1986-87	
(140) by the student capacity at Buder School (550)	
(140 divided by 550 = .254)	25%

The other opinions expressed regarding Ritenour's budget request were provided by the City Board and "certain St. Louis County school districts" (specifically Bayless, Brentwood, Clayton and Hancock Place jointly, hereinafter referred to as "county school districts"). City

Board took exception to the State's argument that City Board should share funding of any Court-ordered host district capital improvements. The City Board points out that the other activities listed under X.B.3 are fully state funded, and that this issue was not raised regarding Rockwood's budget request in 1984 (which Judge Hungate ordered only the State to fund). In fact, the State did not even raise this issue at any of the BRC meetings with regard to Ritenour's budget request.

The county school districts also believe that the question of the State's liability pursuant to X.B.3 was settled long ago. They refute the argument that X.B.3 limits reimbursement of only capital costs by pointing out that the only limiting language in X.B.3 (in connection with one-time extraordinary costs) is "other than hiring of personnel." They support Ritenour's proration factor (albeit they believe that no proration factor is necessary or mandated) because the total number of elementary transfer students impacts upon the necessity to reopen an elementary school. Finally, because "[t]he mechanics of obtaining approval of a budget request . . . is somewhat time consuming . . . impractical", costs expended prior to BRC review and Court approval should not be disallowed.

Section X.B.3 of the Settlement Agreement provides that:

> The cost of the incentives for provisions for voluntary teacher exchanges under Section VI (Faculty), the cost of student recruitment, start-up costs and building modification costs of new magnet schools and expanded magnet costs to schools programs, one-time extraordinary costs (other than hiring of personnel) such as the costs associated with reopening a closed

> school, the costs of community involvment (sic) centers and part-time educational programs, transportation of transferring pupils, the operating expense of the VICC, its staff and the Recruitment and Counseling Center and each of its offices, the costs relating to the improvements in educational programs offered by the City Board in Section IV (Quality Education) and such other costs incurred pursuant to this Settlement Agreement shall be paid by such combination of additional State funding pursuant to Court of Appeals for the Eighth Circuit's decision in *Liddell et al v. Board of Education et al.*, 677 F.2d 626, 641-642 (8th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3258 (Oct. 5, 1982) (No. 81-2022) and a tax rate increase in the City of St. Louis as shall be ordered by the Court. These payments shall be in addition to the payments set forth in paragraphs a and b above.

The Court agrees that the issue of the State's liability has been settled for some time. Most, if not all the activities listed in §X.B.3, are fully State funded. The district court, in Order H(3512)84, required only the State to fund the capital expenditures of reopening closed classrooms in the Rockwood School District. The issue of the State's obligation to fund proposed capital renovations under §X.B.3 was presented to the district court and was decided by the district court. The district court's opinion is somewhat vague as to the question of whether *only* the State is obligated to fund capital renovations under §X.B.3. However, after considering the history of the application of §X.B.3 and the circumstances of Order H(3512)84, this Court construes §X.B.3 to impose liability upon the State solely unless the Court finds that exigent circumstances necessitates the Court's ordering a tax increase in the City of St. Louis. No such circumstances presently exist.

Order H(3512)84 is of little assistance as to the question of what constitutes "costs associated with reopening a closed school." It is true that the district court's approval of the 1984 Rockwood budget provided only for capital costs; however, Rockwood requested only capital costs. There was no dispute regarding type of costs.

The State argues that host district incentives should be utilized to defray capital costs. Both the BRC Chairperson and Ritenour correctly point out that host district incentives do not include capital costs. Host district incentives are based upon a State-established formula for calculating costs per pupil. "Costs per pupil" are recurring operating costs necessary to educate a student. Furthermore, state foundation aid and trust fund payments are designed to assist with the county district's operating costs. Capital outlay expenditures are not part of the calculations for either "per pupil costs" or host district incentives.

Consequently, since recurring operating costs such as instructional materials and supplies are already included in calculating per pupil costs and reimbursed through the host district incentives, (i.e. §X.B.1), this Court determines that §X.B.3 covers only capital expenditures associated with re-opening a closed school. The Court accepts the Chairperson's recommendation to delete recurring operating costs, in the amount of $43,865.92, from Ritenour's budget request.

The Court also accepts the Chairperson's recommendation to delete those expenditures made by Ritenour prior to submission of its budget request to the BRC and approval by this Court. Court orders require that all districts and committees presenting Plan budgets follow certain prescribed procedures and time lines. When the county

districts entered into the Settlement Agreement, they implicitly agreed to abide by all court orders regarding the desegregation case, especially the 12(C) Settlement Plan. It is not acceptable to circumvent established procedures because of a belief such procedures are "time-consuming and impractical."

Although a proration factor was not used by Judge Hungate in 1984, this Court believes that a proration factor is the only fair way to distinguish between desegregation-related capital costs and general capital costs. It is undisputed that Ritenour is not only experiencing an increase in its student population due to transfer students, but also due to an increasing resident student population. Reopening Buder benefits the desegregation plan and Ritenour's general educational objectives; however, the State is financially responsible only for capital improvements necessitated by Ritenour's participation in the 12(c) Settlement Plan. The Court agrees with the Chairperson and the State's position that the total capital cost (of reopening Buder) be prorated to identify the additional capital expense incurred by Ritenour due to the admission of additional transfer students to meet its Plan goal (i.e. new elementary transferees for 1986-87). The Court realizes that the total number of elementary transfer students contributes to the necessity of additional classroom space. Yet, the Court presumes that elementary transfer students have been adequately accommodated up to this point and that it is the additional elementary transfer students for 1986-87 (along with increased numbers of resident elementary students) which require reopening Buder. Ritenour's target for elementary transfer students for 1986-87 totals 273. This is an increase of 140 from 1985-86. Buder's enrollment capacity is 550 elementary students.

The Court accepts the Chairperson's and the State's proration factor of 25% (140 divided by 550 = .254).

As for the reasonableness of the costs, the Court concurs with the Chairperson's determination that Ritenour's budgeted costs are reasonable and that renovation was effectuated in a fiscally prudent manner.

Accordingly, the Court accepts the Chairperson's recommendation that the proposed Ritenour School District budget for one-time extraordinary costs associated with the reopening of Buder Elementary School be approved for the total amount of $108,783.00. The budgeted amount shall be fully funded by the State. The Court further accepts the Chairperson's recommendation that payment, by the State, be made on or before June 30, 1987. The maximum amount of $108,783.00 is subject to modification depending upon actual costs (as compared to the budgeted costs) and the actual number of accepted additional elementary transfer students for 1986-87 (proration factor may need recalculation).

Dated this 27th day of August, 1986.

s/ Stephen N. Limbaugh
United States District Judge

(Filed February 8, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1957

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel Yarber, her father and next friend, and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellees,

Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,
United States of America,

Board of Education of the City of St. Louis, State of Missouri, Daniel L. Schlafly, Frederick E. Bussee, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev.

James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris (Members of the School Board); and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, Davis J. Mahan, Charles Brasfield (School District Superintendents); and Robert E. Wentz (Superintendent of Schools), all in their official capacities,

Appellees,

St. Louis County, Gene McNary, County Executive; Harlow Richardson, County Treasurer; George C. Leachman, Collection of St. Louis County Contract Account,

Affton Board of Education, Bayless Board of Education, Brentwood Board of Education, Clayton Board of Education, Ferguson-Florissant Reorganized R-2, Hancock Place Board of Education, Hazelwood Board of Education, Jennings Board of Education, Kirkwood Board of Education, Ladue Board of Education, Lindbergh Board of Education, Maplewood-Richmond Heights Board of Education, Mehlville Board of Education, Normandy Board of Education, Parkway Board of Education, Pattonville Board of Education, Ritenour Board of Education, Riverview Gardens Board of Education, Rockwood Board of Education, Valley Park Board of Education, University City Board of Education, Webster Groves Board of Education and Wellston Board of Education,

Appellees,

v.

State of Missouri; Arthur Mallory, Commissioner of Education of the State of Missouri, in his official capacity; The State of Missouri Board of Education; Christopher S. Bond, Governor of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Melvin E.

Carnahan, Treasurer of the State of Missouri; Stephen C. Bradford, Commissioner of Administration of the State of Missouri; The State of Missouri Board of Education and its members: Erwin A. Williamson (President), Jimmy Robertson (Vice President), Grover A. Gamm, Delmar A. Cobble, Dale M. Thompson, Donald W. Shelton and Robert Welling,

Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 83-2033

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel Yarber, her father and next friend, and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellees,

Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,
United States of America,

Board of Education of the City of St. Louis, State of Missouri, Daniel L. Schlafly, Frederick E. Bussee, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris (Members of the School Board); and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents); and Robert E. Wentz (Superintendent of Schools), all in their official capacities,

Appellees,

St. Louis County, Gene McNary, County Executive, Harlow Richardson, County Treasurer, George C. Leachman, Collection of St. Louis County Contract Account,

Appellees,

Affton Board of Education, Bayless Board of Education, Brentwood Board of Education, Clayton Board of Education, Ferguson-Florissant Reorganized R-2, Hancock Place Board of Education, Hazelwood Board of Education, Jennings Board of Education, Kirkwood Board of Education, Ladue Board of Education, Lindbergh Board of Education, Maplewood-Richmond Heights Board of Education, Mehlville Board of Education, Normandy Board of Education, Parkway Board of Education, Pattonville Board of Education, Ritenour Board of Education, Riverview Gardens Board of Education, Rockwood Board of Education, Valley Park Board of Education, University City Board of Education, Webster Groves Board of Education and Wellston Board of Education,

Appellees,

v.

State of Missouri; Arthur Mallory, Commissioner of Education of the State of Missouri, in his official capacity; The State of Missouri Board of Education; Christopher S. Bond, Governor of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Melvin E. Carnahan, Treasurer of the State of Missouri; Stephen C. Bradford, Commissioner of Administration of the State of Missouri; The State of Missouri Board of Education and its members: Erwin A. Williamson (President), Jimmy Robertson (Vice President), Grover A. Gamm, Delmar A. Cobble, Dale M. Thompson, Donald W. Shelton and Robert Welling,

Appellees,

St. Louis Teachers Union, Local 420, American Federation of Teachers,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 83-2118

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel Yarber, her father and next friend, and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and

Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellees,

Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Jan s Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,

Appellant,

United States of America,

Appellee,

Board of Education of the City of St. Louis, State of Missouri, Daniel L. Schlafly, Frederick E. Bussee, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris (Members of the School Board) and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents); and Robert E. Wentz (Superintendent of Schools), all in their official capacities,

Appellees,

St. Louis County, Gene McNary, County Executive, Harlow Richardson, County Treasurer, George C. Leachman, Collection of St. Louis County Contract Account,

Appellees,

Affton Board of Education, Bayless Board of Education, Brentwood Board of Education, Clayton Board of Education, Ferguson-Florissant Reorganized R-2, Hancock Place Board of Education, Hazelwood Board of Education, Jennings Board of Education, Kirkwood Board of Education, Ladue Board of Education, Lindbergh Board of Education, Maplewood-Richmond Heights Board of Education, Mehlville Board of Education, Normandy Board of Education, Parkway Board of Education, Pattonville Board of Education, Ritenour Board of Education, Riverview Gardens Board of Education, Rockwood Board of Education, Valley Park Board of Education, University City Board of Education, Webster Groves Board of Education and Wellston Board of Education,

Appellees,

v.

State of Missouri; Arthur Mallory, Commissioner of Education of the State of Missouri, in his official capacity; The State of Missouri Board of Education; Christopher S. Bond, Governor of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Melvin E. Carnahan, Treasurer of the State of Missouri; Stephen C. Bradford, Commissioner of Administration of the State of Missouri; The State of Missouri Board of Education and its members: Erwin A. Williamson (President), Jimmy Robertson (Vice President), Grover A. Gamm, Delmar A. Cobble, Dale M. Thompson, Donald W. Shelton and Robert Welling,

Appellees,

St. Louis Teachers Union, Local 420, American Federation of Teachers,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

No. 83-2140

In Re: City of St. Louis, Paul Berra
and Ronald A. Leggett,

Petitioners.

Petition for Writ of Prohibition.

No. 83-2220

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel Yarber, her father and next friend, and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellees,

Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janie Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People,

Appellees.

City of St. Louis,

United States of America,

Board of Education of the City of St. Louis, State of Missouri, Daniel L. Schlafly, Frederick E. Bussee, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris (Members of the School Board); and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents); and Robert E. Wentz (Superintendent of Schools), all in their official capacities,

Appellees,

St. Louis County, Gene McNary, County Executive, Horlow Richardson, County Treasurer, George C. Leachman, Collection of St. Louis County Contract Account,

Appellees,

Affton Board of Education, Bayless Board of Education, Brentwood Board of Education, Clayton Board of Education, Ferguson-Florissant Reorganized R-2, Hancock Place Board of Education, Hazelwood Board of Education, Jennings Board of Education, Kirkwood Board of Education, Ladue Board of Education, Lindbergh Board of Education, Maplewood-Richmond Heights Board of Education, Mehlville Board of Education, Normandy Board of Education, Parkway Board of Education, Pattonville Board of Education, Ritenour Board of Education, Riverview Gardens Board of Education, Rockwood Board of Education, Valley Park Board of Education, University City Board of Education, Webster Groves Board of Education and Wellston Board of Education,

Appellees,

v.

State of Missouri; Arthur Mallory, Commissioner of Education of the State of Missouri, in his official capacity; The State of Missouri Board of Education; Christopher S. Bond, Governer of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Melvin E. Carnahan, Treasurer of the State of Missouri; Stephen C. Bradford, Commissioner of Administration of the State of Missouri; The State of Missouri Board of Education and its Members Erwin A. Williamson (President), Jimmy Robertson (Vice President), Grover A. Gamm, Delmar A. Cobble, Dale M. Thompson, Donald W. Shelton and Robert Welling,

St. Louis Teachers Union, Local 420, American Federation of Teachers,

North St. Louis Parents and Citizens for Quality Education, an unincorporated association, including William Upchurch, Vivian Ali, and Dorothy Robins, parents of children attending the St. Louis city public schools and members of the regional plaintiff classes who objected to the settlement agreement,

Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri.

No. 83-2554

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel

Yarber, her father and next friend, and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellees,

Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,
United States of America,

Board of Education of the City of St. Louis, State of Missouri, Daniel L. Schlafly, Frederick E. Bussee, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris (Members of the School Board); and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendents); and Robert E. Wentz (Superintendent of Schools), all in their official capacities,

Appellees,

St. Louis County, Gene McNary, County Executive, Harlow Richardson, County Treasurer, George C. Leachman, Collection of St. Louis County Contract Account,

Appellees,

Affton Board of Education, Bayless Board of Education, Brentwood Board of Education, Clayton Board of Education, Ferguson-Florissant Reorganized R-2, Hancock Place Board of Education, Hazelwood Board of Education, Jennings Board of Education, Kirkwood Board of Education, Ladue Board of Education, Lindbergh Board of Education, Maplewood-Richmond Heights Board of Education, Mehlville Board of Education, Normandy Board of Education, Parkway Board of Education, Pattonville Board of Education, Riverview Gardens Board of Education, Ritenour Board of Education, Rockwood Board of Education, Valley Park Board of Education, University City Board of Education, Webster Groves Board of Education and Wellston Board of Education,

Appellees,

v.

State of Missouri; Arthur Mallory, Commissioner of Education of the State of Missouri, in his official capacity; The State of Missouri Board of Education; Christopher S. Bond, Governor of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Melvin E. Carnahan, Treasurer of the State of Missouri; Stephen C. Bradford, Commissioner of Administration of the State of Missouri; The State of Missouri Board of Education and its members: Erwin A. Williamson (President), Jimmy Robertson (Vice President), Grover A. Gamm, Delmar A. Cobble, Dale M. Thompson, Donald W. Shelton and Robert Welling,

Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: November 28, 1983
Filed: February 8, 1984

Opinion of the Court *En banc*, LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, and FAGG, Circuit Judges, with JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part, and BOWMAN, Circuit Judge, dissenting.

The Caldwell and Liddell plaintiffs, representing black students and parents of the St. Louis City School District, the City School District, and several suburban school districts have entered into a unique and comprehensive settlement agreement designed to further desegregation in the city schools. The United States District Court has approved the agreement and has entered orders to fund the plan.

With the exceptions and limitations noted in the opinion, we approve the agreement and the order entered by the district court with respect to:

The voluntary transfers of students between the city and suburban schools and the establishment of additional magnet schools and integrative programs in the City School District as necessary to the successful desegregation of the city schools;

The quality education programs for the nonintegrated schools in the City School District;

The quality education programs for all schools in the City School District, but only insofar as these pro-

grams have been shown to be necessary for the city to retain its Class AAA rating or to be essential to the successful desegregation of the city schools as hereinafter set forth;

The provisions of the district court's order requiring the State of Missouri, as the primary constitutional violator, to pay the full cost of city to suburb and suburb to city transfers, magnet schools and integrative programs in the city schools, and one-half of the cost of the quality education programs in the city schools. We decline to approve the district court order insofar as it requires the State to fund student transfers between suburban school districts and to fund magnet schools or integrative programs in those suburban districts;

Improved facilities for the city schools. We require further planning, however, before construction begins, to identify with particularity the projects that will be undertaken, and to take account of a probable decline in the city school population in the next few years.

We outline the steps that the district court must take before it can require an increase in real estate taxes to fund the City Board's share of the quality education component of the plan without a vote of the people, and the steps that the court must take before it can require that bonds be issued to fund the City Board's share of capital improvements without a similar vote. We make it clear, however, that no party found to have violated the Constitution will be permitted to escape its obligation to provide equal educational opportunity to the black children of St. Louis.

We make it clear that the suburban schools meeting the goals set forth in the plan will receive a final judgment

declaring that they have satisfied their desegregation obligations.

Finally, we recognize that the settlement agreement and the district court's order will have to be modified to conform to this opinion, and we are aware that the cost of the plan, particularly to the State, will be significantly reduced. In our view, however, the changes do not alter the essential character of the plan, and they preserve its constitutionality. The parties to the settlement agreement are required to decide promptly whether they will accept the changes set forth in this opinion. If they refuse to do so, the interdistrict trial will proceed.

I. PROCEDURAL HISTORY.

In February, 1972, a group of black parents (the Liddell plaintiffs) filed a class action against the City Board, the board members, and school administrators, alleging racial segregation in the city's schools in violation of the fourteenth amendment. The defendants' motion to join the State of Missouri and St. Louis County (containing the suburban school districts) as codefendants was denied on December 1, 1973. A year later, the parties entered into a consent agreement which provided for an increase in the number of minority teachers and included a pledge by the City Board to attempt to "relieve the residence-based racial imbalance in the City schools." *Liddell v. Bd. of Educ.*, 469 F. Supp. 1304, 1310 (E.D. Mo. 1979).

The case first came before this Court in 1976,[1] when the Caldwell plaintiffs appealed the district court's denial

1. We recounted the procedural history of this litigation in *Liddell v. Bd. of Educ.*, 677 F.2d 626, 628 n.1 (8th Cir. 1982) (*Liddell V*), *cert. denied*, 103 S. Ct. 172 (1983) and *Adams v. United States*, 620 F.2d 1277, 1281-1283 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980).

of their right to intervene. We granted intervention, but declined to pass on the constitutionality of the consent decree. *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir.) (*Liddell I*), *cert. denied*, 433 U.S. 914 (1976). We encouraged the United States and State of Missouri to intervene, recommended the creation of a biracial citizens committee to assist in formulating a desegregation plan, and suggested voluntary interdistrict student transfers as one remedial tool. *Id.* at 774.

Desegregation plans were developed and submitted to the district court by the City Board, the Liddell plaintiffs, the Caldwell plaintiffs, and the United States as amicus curiae. Before approving any plan, the district court ordered a trial to determine whether there had been a constitutional violation and to frame a remedy if a violation was found. The United States, the City of St. Louis, and two white citizens' groups were allowed to intervene as plaintiffs. The State of Missouri, the State Board of Education, and the Commissioner of Education were added as defendants. The district court found no constitutional violation, and held that the City Board had achieved a unitary school system in 1954-56 through its "neighborhood school policy." *Liddell v. Bd. of Educ.*, *supra*, 469 F. Supp. at 1360-1361.

We reversed the district court in *Adams v. United States*, 620 F.2d 1277 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980),[2] holding that the City Board and the State were jointly responsible for maintaining a segregated school system. In reaching this decision, we noted that the Missouri State Constitution had mandated

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2. We also ruled on several procedural questions in the interim between *Liddell I* and *Adams*, *see Liddell v. Caldwell*, 553 F.2d 557 (8th Cir. 1977) (*Liddell II*).

separate schools for "white and colored children" through 1976, that the State had not taken prompt and effective steps to desegregate the city schools after *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*), and that the City Board's policies and practices since 1956 had contributed to the existing segregation. We remanded to the district court and directed that the schools be promptly desegregated. We suggested the following techniques:

> (1) Developing and implementing compensatory and remedial educational programs. * * *
>
> (2) Developing and implementing programs providing less than full-time integrated learning experiences.
>
> (3) Developing and implementing a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County. * * *
>
> (4) Maintaining existing magnet and specialty schools, and establishing such additional schools as needed to expand opportunities for an integrated education.
>
> (5) Establishing an Educational Park.
>
> (6) Continuing and expanding a policy of permissive transfers in the district.

Adams v. United States, supra, 620 F.2d at 1296-1297 (citations omitted).

After holding extensive evidentiary hearings, the district court approved a system-wide desegregation plan for the city schools beginning with the 1980-81 school year. *Liddell v. Bd. of Educ.*, 491 F. Supp. 351 (E.D.

Mo. 1980). This plan included a comprehensive program of exchanging and transferring students between the city and suburban schools, the establishment of magnet schools and integrative programs, and a quality education component. In approving the plan, the district court concluded:

> In sum, the State defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected[.]

Id. at 359.

We affirmed the district court's plan on appeal. *Liddell v. Bd. of Educ.*, 667 F.2d 643 (8th Cir. 1981) (*Liddell III*), *cert. denied*, 454 U.S. 1081, 1091 (1982). In so doing, we decided that it was constitutionally permissible to allow a number of all-black schools to remain in the city. We noted that no all-white schools would remain, that a plan of voluntary interdistrict transfers would be initiated, that magnet schools and integrative programs would be established, and that a substantial part of the desegregation budget would be spent to improve the quality of education in the all-black schools. We affirmed the State's liability for desegregation costs and remanded for continued implementation of the plan.

Questions about this plan's implementation came before us in early 1982, when the State again protested its liability for certain desegregation costs. *Liddell v. Bd. of Educ.*, 677 F.2d 626 (8th Cir.) (*Liddell V*), *cert. denied*, 103 S. Ct. 172 (1982).[3] We affirmed the district

3. We issued a procedural order in the interim. *Liddell v. Bd. of Educ.*, 693 F.2d 721 (8th Cir. 1981) (*Liddell IV*).

court's allocation of costs, placing one-half of the actual desegregation costs on the State. We also required the State to pay the costs of voluntary interdistrict transfers and the costs of merging city and county vocational educational programs. Meanwhile, the City Board and the Liddell and Caldwell plaintiffs continued to seek the consolidation of the city and county schools into a single integrated school district on the theory that the suburban schools had also violated the Constitution. They successfully moved to add the county school districts and St. Louis County officials as defendants to this litigation. We noted that the suburban schools could not be held as constitutional violators without further evidentiary hearings and findings by the district court. We again noted that the State and City Board—already adjudged violators of the Constitution—could be required to fund measures designed to eradicate the remaining vestiges of segregation in the city schools, including measures which involved the voluntary participation of the suburban schools. *Liddell V*, *supra*, 677 F.2d at 641.[4]

The district court entered an order on August 6, 1982, which disclosed the mandatory interdistrict plan it would

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4. We suggested that

> the district court could (1) require the state and the city to take additional steps to improve the quality of the remaining all-black schools in the City of St. Louis; (2) require that additional magnet schools be established at state expense within the city or in suburban school districts with the consent of the suburban districts where the schools would be located; (3) require that additional part-time programs be established at state expense to provide for more integrative experiences for students in all-black city schools, including programs which would involve voluntary participation by suburban schools; and (4) require the state to provide additional incentives for voluntary interdistrict transfer.

Liddell V, *supra*, 677 F.2d at 641-642 (footnote omitted).

impose in the event the suburban school districts were found liable for constitutional violations. This plan would create one unified metropolitan school district with a uniform tax rate. The court then scheduled interdistrict liability hearings.

Before these hearings were held, however, the City Board, the Liddell plaintiffs, the Caldwell plaintiffs, and all twenty-three county school districts developed a settlement agreement with the assistance of a court-appointed expert and filed a proposed consent decree on March 30, 1983. This agreement settled the plaintiffs' interdistrict claims against the county school districts, and also enabled the State and City Board to take important steps to desegregate the city schools through the voluntary participation of the county schools, as we outlined in *Liddell V*.

The settlement plan has several components. It provides for voluntary interdistrict transfers between city and suburban schools and includes fiscal incentives to encourage these transfers. Each county school district which receives enough transfers within five years to satisfy its desegregation obligations under the plan will receive a final judgment. Affirmative hiring requirements and voluntary teacher transfers are included in the plan to assure it will have a substantial impact in the county schools. To attract white student transfers to the city, and also to provide remedial programs for city students, the plan creates additional magnet schools in the city and the county, and has several compensatory and remedial education components. These latter components are designed to improve the quality of education in the city schools, and to make special improvements in the all-black schools.

After the parties filed the settlement agreement, the district court conducted hearings in April and May of

1983 to determine whether the settlement plan is fair, reasonable, and adequate. In its July 5, 1983, order, the court concluded the plan met these standards and allocated the costs of the plan between the State and City Board. *Liddell v. Bd. of Educ.*, 567 F. Supp. 1037 (E.D. Mo. 1983). The State is totally responsible for the costs of the voluntary interdistrict transfers, the magnet schools, and various part-time and alternative integrative programs. Further, the State will pay one-half of the cost of the quality improvements in the city schools and one-half of the capital improvements required by the plan. The City Board is required to pay the remaining costs.

The district court ordered the City Board to submit a bond issue to its voters before February 1, 1984, to fund its share of the capital improvements required under the plan. In the event this bond issue failed to obtain the necessary two-thirds vote the court reserved authority to consider an appropriate order to fund these capital improvements.[5] The district court also deferred a scheduled reduction in the City Board's operating levy otherwise required by Mo. Rev. Stat. § 164.013 (Proposition C) insofar as this revenue is necessary to fund the City Board's share of desegregation costs. It further reserved authority to order an increase in the City Board's property tax rate, following notice and a hearing on the amount, if the revenue necessary to fund the City Board's constitutional obligation to desegregate the city schools is not otherwise available.

Several weeks after the district court entered its order approving the settlement, the State filed a motion to stay

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5. The two-thirds majority is required by Mo. Const. art. VI, § 26(b). This bond issue election was held on November 8, 1983, and it failed, receiving fifty-five percent voter approval.

the implementation of the plan. The City of St. Louis filed a petition for a writ of prohibition seeking the same result. The district court denied both of these motions, and the State and City of St. Louis appealed to our Court. In an en banc order, *Liddell v. Missouri*, 717 F.2d 1180 (8th Cir. 1983) (*Liddell VI*), we denied the stay with certain exceptions. We froze the number of interdistrict transfers and deferred any further district court action concerning the City Board's property tax rate. We also deferred action on the writ of prohibition until we considered the case on its merits.

Appeals were filed from the district court's July 5, 1983, order by the State of Missouri, the City of St. Louis, the North St. Louis Parents and Citizens for Quality Education, and the St. Louis Teachers Union.

The State contends on appeal that the district court erred: (1) in approving additional interdistrict transfers of students, and requiring the State to pay the full cost of the additional transfers; (2) in approving additional magnet schools and part-time integrative programs, and requiring the State to pay their full cost; (3) in approving certain programs to improve the quality of education in the city schools, and requiring the State to pay one-half the cost of these programs; and (4) in ordering a deferral of scheduled property tax reduction for the city schools, and in stating that it would order a further increase in property taxes to fund the City Board's share of the cost of the quality education programs in the city schools.

The City of St. Louis joins in questioning the authority of the district court to enter the taxing order referred to in (4) above.

The St. Louis Teachers Union contends that the district court erred in denying its motion to intervene.

The Northside Parents Organization contends that the district court erred in failing to provide more extensive relief to the black students who would remain in the nonintegrated schools.

The United States did not file a notice of appeal or cross-appeal. It did file a brief and it was permitted to argue its position before the Court *en banc*. It appears to argue that many of the programs authorized by the district court may be necessary to desegregate the city schools, but questions whether the district court's factual findings are sufficient to support all aspects of the district court's remedial order. It asks this Court to remand to the district court to correct the alleged deficiencies.[6]

II. INTERDISTRICT TRANSFERS

On July 2, 1981, the district court entered an order authorizing voluntary interdistrict transfers and requiring the State to pay the cost of the transfers. The program was initiated at the beginning of the 1981-82 school year, and by the end of the 1982-83 school year, it had grown so that 873 city students were attending county schools

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6. We question whether the United States should be heard as a party. Parties who do not appeal from a trial court judgment cannot be heard to attack that judgment, either to enlarge their own rights, or to lessen the rights of their adversary. *See Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 190-191 (1937); *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Stella v. DePaul Community Health Center, Inc.*, 642 F.2d 258, 261 (8th Cir. 1981); *Johnson v. United States Fire Ins. Co.*, 586 F.2d 1291, 1294 n.7 (8th Cir. 1978); *Tiedeman v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 513 F.2d 1267, 1271-1273 (8th Cir. 1975).

Here, the United States is requesting that the district court's order be vacated and that the case be remanded for further findings. This result would "lessen the rights" of the parties to the settlement agreement. In practical terms, however, we have considered the United States's position as an amicus curiae.

and 318 county students were attending city schools. All but seven of the 318 were enrolled in city magnet schools. The State of Missouri paid the cost of these transfers, including transportation costs and fiscal incentives, to the sending and receiving schools.

The settlement agreement calls for an expanded program of interdistrict transfers. City-to-county transfers of black students will be permitted to grow incrementally until they reach 15,000. No limit is placed on the county-to-city transfers, but the number is not expected to exceed 3,000. These transfers are expected to be primarily to city magnet schools and programs. Transfers between county districts are also permitted. All student transfers are voluntary.

The State's funding obligations remain as they were under the July 2, 1981, order: It must pay transportation costs and must pay to the receiving district for each transferring student an amount equal to the receiving district's cost per pupil, less State aid and trust fund allocation. It is further required to provide fiscal incentives to sending districts which may elect payment under one of two formulas: either one-half of the State aid the district would have received had the student not transferred; or, beginning in 1984-85, if a district sends more students than it receives, State aid based on the district's enrollment for the second prior year. To be eligible for transfer, students of good standing must be in the racial majority in their home districts and must transfer to districts where they would be in the racial minority.

After approval of the settlement agreement, transfers rose dramatically. During the current school year, 2,294 city students have transferred to suburban districts and

three hundred and eighty-nine suburban students have transferred to city schools. Thirty-four suburban students have transferred to other suburban districts. One thousand nine-hundred and sixty-five additional city-to-county transfer applications are on file.

The settlement agreement provides that participating districts will receive a final judgment releasing them from further liability if they achieve the plan ratio[7] within five years. Litigation is stayed during this period. If the school district does not reach the plan ratio, litigation can be renewed after first pursuing various negotiating procedures. If the liability of any individual school district is litigated, the plaintiffs must prove liability and may not seek reorganization or consolidation of school districts, nor may they seek a minority enrollment exceeding twenty-five percent of the school district.

The State argues that the district court order approving the settlement agreement and requiring the State to pay the full cost of interdistrict transfers cannot be sustained because it imposes an interdistrict remedy based on an intradistrict violation. We disagree for two reasons: First, the issue has previously been decided adversely to the State; second, the interdistrict transfers are intrinsic to an effective remedy for the intradistrict violation and are justified by precedent.

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7. Under the Plan Ratio, * * * a suburban school district would accept up to as many black transfer students as would constitute 15 percent of the total student population in that district, but no suburban school district would be required to accept more black transfer students than would raise the overall percentage of blacks in the total student population higher than 25 percent.

Settlement Agreement, I-2.

A. THE PROPRIETY OF THE DISTRICT COURT'S ORDER WITH RESPECT TO INTERDISTRICT TRANSFERS HAS BEEN PREVIOUSLY DECIDED.

This Court has repeatedly authorized the interdistrict transfer of students as a fundamental element of an effective remedy for the unconstitutional segregation of the city schools. In *Adams v. United States, supra*, 620 F.2d at 1296, we specifically approved the development and implementation of "a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County."

In *Liddell III, supra*, 667 F.2d at 650, we rejected the State's argument that the district court was without authority to formulate an interdistrict plan without finding an interdistrict violation. We also noted that voluntary interdistrict pupil exchanges "must be viewed as a valid part of the attempt to fashion a workable remedy within the City." *Id.* at 651. In an order appended to that opinion, we noted that the State had been "judicially determined to be a primary constitutional violator," and we held that an interdistrict transfer plan would be salutary and would be entirely enforceable against the State. *Id.* at 659.

Finally, in *Liddell V, supra*, 677 F.2d at 630, we reiterated our conclusion that, because the State had been found a primary constitutional wrongdoer, it can "be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district." After discussing broad-based interdistrict proposals and dismissing them as unsuitable, we addressed

the proper limits of the district court's equitable remedial authority:

> [T]he district court can require the existing defendants—the state and city school board—to take the actions which will help eradicate the remaining vestiges of the government-imposed school segregation in the city schools, including actions which may involve the voluntary participation of the suburban schools. For example, the district court could * * * (4) require the state to provide additional incentives for voluntary interdistrict transfer.

Id. at 641-642 (footnote omitted).

We did not act hastily or arbitrarily in approving voluntary interdistrict transfers. We outlined the reasons for our decision in *Adams v. United States*, *supra*, 620 F.2d at 1291-1297. We reviewed the parties' proposed remedial alternatives, several of which involved extensive cross-busing between city schools. The Caldwell plaintiffs proposed a seventy-five percent black/twenty-five percent white racial mix within the district. The Liddell plaintiffs, through their expert witness, Dr. David Colton, proposed a four-tier division of the schools by age groups, which would integrate schools above fourth grade to achieve a sixty percent/forty percent or fifty-five percent/forty-five percent ratio of black to white students. All whites above third grade would attend integrated schools and all blacks would receive at least one-third of their education above third grade in integrated schools. The Department of Justice, through its expert witness, Dr. Gary Orfield, proposed maintenance and expansion of integration in all grades, voluntary interdistrict and intradistrict transfers, magnet schools, in-

tegration of personnel, and community involvement. The Board of Education proposed the creation of integrated junior high schools which would funnel students to high schools in a balanced fashion. Magnet schools would supplement these junior high schools. The white parents proposed that the schools be left as they were or, alternatively, that the city and county schools be merged and a comprehensive plan for interdistrict student transfers be developed.

Of the four plans submitted by the parties, we found that only the Colton and Orfield plans were constitutionally permissible. We rejected the City Board's plan as too little too late: elementary schools would remain entirely segregated and desegregation of the upper tiers would be delayed four to seven years. We rejected the Caldwell plan because the record supported the district court's finding that implementation of the plan would probably result in an all-black school system within a few years. We found that the Colton plan was permissible with some substantial changes, but that plan was discarded by the district court after it found that the plan was "educationally unsound" and that it would "fail to achieve effective desegregation." *Liddell v. Bd. of Educ.*, *supra*, 491 F. Supp. at 356.

The approach suggested by the United State's expert, Dr. Orfield, was ultimately adopted by the district court as the plan that held "the promise of providing 'the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.'" *Id.* at 359, citing *Davis v. Bd. of School Comm'rs*, 402 U.S. 33, 37 (1971). We reaffirmed our support of the Orfield plan in *Liddell III*, *supra*, 667 F.2d at 649-653. We noted that it was the only constitutionally permis-

sible plan submitted that could achieve stable, effective integration while minimizing transportation of students and maintaining integrated schools in integrated neighborhoods. *Id.* at 650.

The State defendants have raised the question of remedial scope twice before the Supreme Court. On June 17, 1981, the State filed a petition for certiorari from our panel opinion in *Liddell III*. In that petition, the State argued that there was no basis for State liability:

> The evidence in this case indicates that the State of Missouri took the necessary and appropriate steps to remove the legal underpinnings of segregated schooling as well as affirmatively prohibiting such discrimination.

State's Petition for Certiorari, No. 80-2152, June 17, 1981, at 17.

It further argued:

> The District Court exceeded its authority in ordering the preparation of a plan of voluntary pupil exchanges between the St. Louis School District and nonparty school districts because (1) an interdistrict violation has neither been pleaded nor proven, and (2) the District Court cannot, consistent with *Milliken v. Bradley*, order the State of Missouri to fund such a voluntary plan simply on the basis of an intradistrict violation.

Id. at 20.

The Supreme Court denied certiorari. *Missouri v. Liddell*, 454 U.S. 1091 (1981).

Not satisfied with this answer, the State raised the same arguments again before our Court in *Liddell IV* and *Liddell V*. Unsuccessful in our Court, the State filed a second petition for certiorari with the Supreme Court on April 30, 1982. The State again argued that

> ordering an inter-district remedy [the 12(a) voluntary transfers, funded by the State] without first finding an inter-district violation and inter-district effect is in conflict with this court's decision in *Milliken v. Bradley I* [and *Hills v. Gautreaux*].

State's Petition for Certiorari, No. 81-2022, April 30, 1982, at 7; *see also id.* at 10.

Again, the Supreme Court denied certiorari. *Missouri v. Liddell*, 103 S. Ct. 172 (1982). Both of the State's petitions for certiorari came after the Supreme Court's decision in *Hills v. Gautreaux*, 425 U.S. 284 (1976).[8]

As a result of our previous holdings and of the Supreme Court's inaction, the use of interdistrict transfers is settled as law of the case. While this doctrine does not foreclose this Court from correcting its errors, it prevents repeated litigation of the same issue and promotes uniformity of decision. *In Re Exterior Siding and Aluminum Coil Antitrust Litigation*, 696 F.2d 613, 616 (8th Cir. 1982), *vacated en banc*, 705 F.2d 980 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 204 (1983). We will reconsider a previously

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8. Although denial of certiorari does not necessarily imply approval of the decision below on the merits, this Court has recognized that denial of certiorari is, under some circumstances, a fact which "cannot be overlooked." *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1274-1275 (8th Cir. 1977). *See also United States v. Kras*, 409 U.S. 434, 443 (1973); *United States v. Thompson*, 685 F.2d 993, 999 (6th Cir.), *cert. denied*, 103 S. Ct. 494 (1982).

decided issue only on a showing of clear error and manifest injustice. *United States v. Unger*, 700 F.2d 445, 450 n.10 (8th Cir.), *cert. denied*, 104 S. Ct. 339 (1983); *Wrist-Rocket Mfg. v. Saunders Archery Co.*, 578 F.2d 727, 730-731 (8th Cir. 1978).

We are loath to retract our previous declarations on settled issues when a case returns on appeal; to do so ignores important considerations of judicial economy and ignores our interest in protecting the settled expectations of parties who have conformed their conduct to our guidelines. In this case, our conclusion that State-funded interdistrict transfers are an appropriate remedy is strengthened by our previous invocation of the law of the case doctrine. *Liddell V*, *supra*, 677 F.2d at 629-630.

The State argues that we should not be bound by our earlier decisions because the magnitude of the proposed plan, with respect both to cost and numbers of students, distinguishes it from existing plans. Neither this Court nor the district court placed any limitation on the number of students that could transfer under the plan in existence during the last two school years, nor were we requested to do so. Moreover, it was clear that the number of transfers would have to be large if the opportunity for an integrated education was to be provided to a significant number of the 30,000 black students that remained in the all-black schools in the city.

Notwithstanding our view that the issues regarding interdistrict transfers have been heretofore decided, we again reach the merits of the matter and, alternatively, hold that the plan and the funding order, as they relate to interdistrict transfers, meet constitutional standards.

B. THE DISTRICT COURT'S ORDER WITH RESPECT TO INTERDISTRICT TRANSFERS MEETS CONSTITUTIONAL STANDARDS.

Since *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*), principles of equity have guided courts in devising remedies to eradicate segregation and its effects. Yet for equitable remedies to pass constitutional muster, they must conform to three overlapping criteria.

> [First], the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. * * * The remedy must therefore be related to "the *condition* alleged to offend the Constitution." * * * Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." * * * Third, the federal courts * * * must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

Milliken v. Bradley, 433 U.S. 267, 280-281 (1977) (*Milliken II*) (citations and footnotes omitted).

Examination of voluntary interdistrict transfers confirms that, as a remedy for an intradistrict violation, such transfers comply with constitutional standards.

> 1. The remedy was closely tailored to the nature and scope of the violation.

The Missouri Constitution requires the State to provide a free public education. Mo. Const. art. 9, § 1(a). The State supervises instruction, distributes funds for public education to local school districts, approves school bus

routes, provides free textbooks, and passes on applications by school districts for federal aid. *See* Mo. Rev. Stat. §§ 161.092, 163.021, 163.031, 163.161, 170.051, 170.055; and *Liddell v. Bd. of Educ., supra*, 469 F. Supp. at 1313-1314.

Before the Civil War, Missouri prohibited the creation of schools to teach reading and writing to blacks. Act of February 16, 1847, § 1, 1847 Mo. Laws 103. State-mandated segregation was first imposed in the 1865 Constitution, Article IX § 2. It was reincorporated in the Missouri Constitution of 1945: Article IX specifically provided that separate schools were to be maintained for "white and colored children."[9] In 1952, the Missouri Supreme Court upheld the constitutionality of Article IX under the United States Constitution. *See State ex rel. Hobby v. Disman*, 250 S.W.2d 137, 141 (Mo. 1952). Article IX was not repealed until 1976. *Adams v. United States, supra*, 620 F.2d at 1280. Under the segregated system, the State bused suburban black students from St. Louis County into the city's black schools to maintain the dual system. *Id.*, at 1281. The city schools remained largely segregated until this Court's decision in *Adams*.

It is clear from the foregoing that the State's presence in public education is immense and that the State's Constitution and statutes mandated discrimination against black St. Louis students on the broadest possible basis. It is equally clear that the discriminatory policies continued after the Supreme Court decided *Brown I, supra*, in 1954. Given the breadth of the State's violation, it was appropriate for the district court to mandate an equally

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9. In addition, state law provided separate libraries, public parks, and playgrounds "for the use of white and colored persons," Mo. Rev. Stat. 10474 (1939), and established separate "institutes for colored teachers," Mo. Rev. Stat. 10632 (1939).

comprehensive remedy. The potential for integration within the district, however, was limited by the fact that almost eighty percent of the students were black, and by the district court's finding that if it integrated the city schools by imposing an eighty twenty ratio in each school, an all-black school system would probably result. With that in mind, the district court properly considered the alternative of voluntary transfers to county districts. The opportunity for effective integration became a reality when the county schools agreed to accept the voluntary transfer of several thousand black students.[10]

2. The remedy restores the victims of discrimination as nearly as possible to the position they would have occupied absent that discrimination.

We have heretofore enumerated the alternative remedies suggested by the parties, and we have explained why the district court selected a remedy which included voluntary interdistrict transfers and why this Court approved that remedy. (*See supra* pp. 25-26.)

We are met for the first time on this appeal with a new, or at least a more precisely framed, argument against interdistrict transfers. The State asserts that the district court cannot require the State to fund extensive interdistrict transfers unless the record supports and the district court finds that the black children of St. Louis would have attended schools in the county had it not been for the State's constitutional prohibition against black and

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10. We also note that the remedial limits imposed by *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977), are inapposite to this case. The findings of *de jure* segregation which distinguish this case were absent in *Dayton*. In that case, the Supreme Court considered the proper scope of an equitable remedy for three isolated instances of discrimination.

white students attending schools together.[11] Nothing in the cases cited by the State[12] suggests or requires us to hold that the district court abused its discretion when it required the State to fund interdistrict transfers of students to consenting districts. Indeed *Milliken II* states that the remedy should correct conditions that "flow from such a violation" and should return victims "to the position they would have enjoyed in terms of education," but for the violation. *Milliken II*, *supra*, 433 U.S. at 282. This remedy does precisely that: It returns the largest number of victims to integrated schools and provides integrative opportunities and compensatory and remedial programs for those who cannot participate in the transfer plan. As

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11. The United States joins in this argument. In earlier proceedings before this Court and the United States Supreme Court, however, it supported the district court's remedial use of voluntary interdistrict transfers. It argued that voluntary interdistrict transfers properly remedied the State's violation, distinguishing them from the overbroad remedy in *Milliken I*, which involved "*imposition* of relief upon nonparty school districts." It asserted that the district court can "order those who have been found liable to make efforts to *persuade* those nonparty districts to cooperate voluntarily." U. S. Brief in Opposition to State's Petition for Certiorari, *Missouri v. Liddell*, No. 80-2152, Aug. 17, 1971, at 14 (emphasis in original).

In a subsequent brief, the United States again distinguished the interdistrict transfers from the impermissible interdistrict remedy in *Milliken I*. Moreover, in endorsing interdistrict transfers, it stated that, under *Hills*, "the State parties can and should be required to take appropriate remedial action for the constitutional violations in which they participated." U. S. Brief in Opposition to the State's Petition for Certiorari, *Missouri v. Liddell*, No. 81-2022, April 30, 1982, at 7,8.

12. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *School District of Omaha v. United States*, 433 U.S. 667 (1977); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

the primary constitutional violator, the State is in no position to complain that some of the victims may elect to transfer to integrated schools in another school district that is willing to accept them.

In our view, *Hills v. Gautreaux* provides precedent for the remedy mandated by the district court. In that case, the Supreme Court considered a remedy against the United States Department of Housing and Urban Development (HUD) for discrimination in public housing in the City of Chicago. The United States Court of Appeals for the Seventh Circuit had reversed the district court's dismissal and ordered the district court on remand to enter summary judgment against HUD for violations of the Fifth Amendment and the Civil Rights Act of 1964 by knowingly sanctioning and assisting the Chicago Housing Authority's (CHA) racially discriminatory public housing program. *Hills v. Gautreaux*, *supra*, 425 U.S. at 291-292. Thereafter, the plaintiffs requested that the district court require HUD to provide public housing outside Chicago's city limits. The district court refused, holding that the wrongs were committed solely against city residents and within the city's boundaries.

On appeal, the Court of Appeals for the Seventh Circuit reversed and the Supreme Court affirmed. The Supreme Court stated:

> We reject the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order against HUD that will affect its conduct in the greater metropolitan area. The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the

> entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief. * * * Our prior decisions counsel that in the event of a constitutional violation "all reasonable methods be available to formulate an effective remedy," *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46, and that every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33, 37. As the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education*: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

Hills v. Gautreaux, *supra*, 425 U.S. at 297 (emphasis added; citations omitted).

The Supreme Court then discussed *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), and the limitation it imposed on the scope of the federal courts' equity powers. In *Milliken I*, the respondents alleged that the Detroit school system was racially segregated and they sought the creation of a unified school district as a remedy. Without finding constitutional violations by the suburban districts and without finding significant segregative effects in those districts, the district court ordered the consolidation of the Detroit school system with fifty-three independent suburban school districts. After the Court of Appeals for the Sixth Circuit affirmed this desegregation order, the Supreme Court reversed, holding that the order exceeded the district court's equitable powers: the courts

must tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." *Id.* at 744.

In evaluating the remedy in *Hills* according to *Milliken I*'s standards, the Supreme Court noted that nothing in *Milliken I* "suggests a *per se* rule that the federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred." *Hills v. Gautreaux*, *supra*, 425 U.S. at 298 (footnote omitted). In *Hills*, the Supreme Court approved the remedy because it did not coerce uninvolved governmental units and because CHA and HUD had the authority to operate outside Chicago's city limits. *Id.*

Justification for requiring the State to fund transfers between city and county schools is stronger than the justification for the remedy in *Hills*. Its role in education is much broader than HUD's role in housing. *See supra* p. 30. In addition, the breadth, gravity and duration of the State's violation here was much greater. The violation scarred every student in St. Louis for over five generations and it gained legitimacy through the State Constitution and through the State's preeminent role in education. In following the Supreme Court's guidelines in *Hills*, we echo its conclusion concerning *Milliken I*. If we barred the use of interdistrict transfers solely because the State's constitutional limitation took place within the city limits of St. Louis, we would transform

> *Milliken* [*I*]'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct.

Hills v. Gautreaux, *supra*, 425 U.S. at 300.

3. The district court's order with respect to interdistrict transfers does not infringe on State or local government autonomy.

The Supreme Court in *Hills v. Gautreaux, supra,* 425 U.S. at 298, has interpreted *Milliken I* to mean that district courts may not restructure or coerce local governments or their subdivisions. This remedy does not threaten the autonomy of local school districts; no district will be coerced or reorganized and all districts retain the rights and powers accorded them by state and federal laws. *See Hills v. Gautreaux, supra,* 425 U.S. at 305-306.

We also find unpersuasive the State's argument that funding this remedy will compel other budget cuts, which would interfere with the autonomy of state and local governments. If we accepted this argument, violators of the Constitution could avoid their remedial responsibility through manipulation of their budgets, leaving victims without redress. Simply put, parsimony is no barrier to a constitutional remedy; "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis,* 373 U.S. 526, 537 (1963).[13]

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13. The district court's funding order poses no eleventh amendment problems. The State relies on *Edelman v. Jordan,* 415 U.S. 651, 663 (1974), to avoid its liability for a remedy that requires the expenditure of state funds where that remedy is allegedly overbroad. The Supreme Court in *Milliken II* applied the prospective compliance exception developed in *Ex Parte Young,* 209 U.S. 123 (1908), which "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken II, supra,* 433 U.S. at 289. After elucidating the three criteria discussed earlier, the Supreme Court in *Milliken II* found that the plan under review there was constitutional. The interdistrict transfer plan under consideration in this case conforms to the same three criteria.

Interdistrict transfers between the city and the county schools may proceed pursuant to the settlement agreement, subject to the following exceptions:

(1) No additional transfers will be permitted for the balance of the current school year. Such transfers would disrupt the education of students in both sending and receiving schools. Planning and recruitment may continue so that enrollment may reach the levels contemplated in the settlement agreement.

(2) City-to-county transfers will be limited to a total of 6,000 students in the 1984-85 school year and to not more than 3,000 additional total transfers in each succeeding school year until the limit of 15,000 is reached. A shortfall of enrollment in one year may be made up in succeeding years.

(3) In the event the number of applicants for transfer exceeds the spaces available, priority shall be given to applicants who would otherwise attend an all-black school.

(4) In *Liddell V*, *supra*, 677 F.2d at 631-632, we warned of the need for vigilance to control the costs of desegregation. Budgetary constraints persist, and so does the need for frugality. We are unwilling, however, to accept the State's suggestion that "complementary zones" be established, which would effectively limit schools that transferees could attend. This would destroy the voluntary nature of the plan. Nevertheless, constant effort and careful planning must be made by all concerned to limit the costs of transportation, insofar as is consistent with the Constitution and the voluntary nature of the plan.

C. COUNTY TO COUNTY TRANSFERS.

Although we approve State funding of transfers of students between the city and county, we are unable to give similar approval to the funding of transfers of students between county districts. We emphasize again that the objective of transfers between the city and county is the eradication of segregation within the city. Such transfers are closely tailored to the violation and are clearly remedial with respect to that violation, according to the standards announced in *Milliken II* which were discussed above. Transfers between county districts, however, are not geared to remedy the violation found within the city. Nor does the record establish that inter-county transfers will materially assist in desegregating the city schools.

We recognize that some suburban school districts have majority black enrollments and others have nearly all-white enrollments. We acknowledge that the suburban districts would achieve a further degree of desegregation by such transfers. We neither prohibit nor discourage such voluntary transfers between county schools but we cannot compel the State to pay for them absent a finding of an interdistrict violation.

III. MAGNET SCHOOLS AND INTEGRATIVE PROGRAMS.

A. MAGNET SCHOOLS.

The district court and this Court previously authorized the creation of magnet schools and integrative programs. About 8,000 students (one-half of whom were blacks) participated in these schools and programs in the 1982-83 school year. Three hundred participants resided

in the county. No one suggests that the magnet schools or integrative programs be discontinued.

The settlement agreement approved by the district court provides for the expansion or replication of existing magnet schools and programs and the development of new magnet schools and programs—in both the city and the county—with total enrollment to reach 20,000 students, twelve to fourteen thousand to be enrolled in city magnets and the balance in county magnets. The new schools would be phased in over the 1983-87 period.

To be eligible for transfer to the magnet schools, students in good standing must be in the racial majority in their home districts and must meet the qualifications for the magnets. Special eligibility requirements allow white students from the city to attend city magnets if the students now attend schools that are less than ten percent or over fifty percent white.[14] Black students in majority black districts are eligible to attend magnet schools and programs in other black majority districts if seats remain open after all of the host district's black students have been accommodated.

The State argues that insufficient attention has been devoted to developing a curriculum designed to attract county students. It also objects to being required to pay the full cost of building and operating the new magnets.

Before reviewing the State's specific arguments, we observe that the utility and propriety of magnets as a

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14. Our affirmance in this case does not preclude the district court from reconsidering these special requirements—to the extent that they permit a white student attending a school with less than ten percent white enrollment to transfer to a city magnet school—in light of decisions by the Supreme Court and this Court. The district court may reconsider these requirements upon the request of any party.

desegregation remedy is beyond dispute. In *Adams v. United States*, *supra*, 620 F.2d at 1296-1297, we evaluated the remedies we had previously found to be constitutionally permissible. We recommended "[m]aintaining existing magnet and specialty schools, and establishing such additional schools as needed to expand opportunities for an integrated education." *Id.* at 1297. We reiterated our approval of magnet schools in *Liddell III*, *supra*, 667 F.2d at 658 (emphasis omitted), where, in considering an intradistrict remedy, we directed the city and suburban school districts to undertake a "study of the feasibilty of establishing magnet schools located in suburban districts with attendance open to student of both the suburbs and the city. * * * The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved." Finally, in *Liddell V*, *supra*, 677 F.2d at 642, we reaffirmed our conclusion that the district court could "require that additional magnet schools be established at state expense within the city or in suburban school districts with the consent of the suburban districts where the schools would be located." As with interdistrict transfers, our previous determinations in this case concerning magnet schools are law of the case.

Had we not in our previous decisions explicitly examined and approved the use of magnet schools and programs, the weight of precedent would nevertheless oblige us now to approve their use. In *Milliken II*, *supra*, 433 U.S. at 272, the Supreme Court mentioned magnet schools as a supplement to the compensatory and remedial programs which it approved in that case. Dissenting in another case, Justice Powell observed that the Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*,

supra, 402 U.S. at 26-27, implicitly encouraged the use of magnet schools:

> Incentives can be employed to encourage [majority-minority] transfers, such as creation of magnet schools providing special educational benefits and state subsidization of those schools that expand their minority enrollments. * * * These and like plans, if adopted voluntarily by States, also could help counter the effects of racial imbalances between school districts that are beyond the reach of judicial correction.

Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 (1979).

This Court also approved magnets as a means of desegregating the Little Rock schools in *Clark v. Bd. of Educ. of Little Rock*, 705 F.2d 265, 269, 272 (8th Cir. 1983).

Courts of Appeals in several other circuits have also approved desegregation plans which include magnets. *Arthur v. Nyquist*, 712 F.2d 809, 811-813 (2d Cir. 1983); *Berry v. School District of Benton Harbor*, 698 F.2d 813, 819 (6th Cir.), *cert. denied*, 104 S. Ct. 236 (1983); *United States v. Texas Education Agency*, 679 F.2d 1104, 1110 (5th Cir. 1982); *Hart v. Community School Bd. of Educ.*, 512 F.2d 37, 54-55 (2d Cir. 1975) (citing successful magnet programs in Boston, Massachusetts; Providence, Rhode Island; and Coney Island, New York); *Stout v. Jefferson County Bd. of Educ.*, 483 F.2d 84, 85 (5th Cir. 1973). District courts have also approved plans that include magnets. *Tasby v. Wright*, 520 F. Supp. 683, 741 (N.D. Tex. 1981), *aff'd in part, rev'd in part, on other grounds*, 713 F.2d 90 (5th Cir. 1983); *Smiley v. Blevins*, 514 F. Supp. 1248, 1260 (S.D. Tex. 1981). A survey of the literature reveals that magnets are being used in at least

eighteen cities. Rossell, *Magnet Schools as a Desegregation Tool*, 14 Urban Education 303, 320 (1979).

Despite the widespread approval of magnet schools by the federal courts, critics maintain that magnet schools cannot correct the deep-seated evils of school desegregation. *See, e.g., Morgan v. Kerrigan*, 530 F.2d 401, 410 & n.10 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *Bradley v. Milliken*, 484 F.2d 215, 243 (6th Cir.), *rev'd on other grounds*, 418 U.S. 717 (1974); *Kelley v. Guinn*, 456 F.2d 100, 108-109 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973). Yet the criticisms in these cases generally apply to desegregation plans in which magnets are the principal tool in a "freedom of choice" plan. They function differently in the settlement agreement approved here by the district court. Magnet schools are a single element of the panoply of remedies approved by this Court and the district court. Like the magnet schools in *Stout v. Jefferson County Bd. of Educ.*, *supra*, 483 F.2d at 86, they are "part of a complex and many-faceted" plan. Magnets perform the salutary function of allowing "non-white as well as the white students so enrolled a chance to widen their horizons through the interplay of ideas and the absorption of diverse sub-cultural attitudes." *Hart v. Community School Bd. of Educ.*, *supra*, 512 F.2d at 54.

Magnet schools under this plan will be distinguished by the features that have made them successful in other cities: individualized teaching, a low pupil-teacher ratio, specialized programs tailored to students' interests, enriched resources and active recruitment. *See* Rosenbaum and Presser, *Voluntary Racial Integration in a Magnet School*, 86 U. Chi. School Rev. 156, 156 (1978); Levine and Eubanks, *Attracting Nonminority Students to Mag-*

net Schools in Minority Neighborhoods, 19 Integrated-ucation 52, 57 (1981). Because they are supplemented by the extensive program of interdistrict transfers and compensatory education, these magnets will not resegregate, nor will they create a dualistic system with elitist schools.

We do not believe that the district court erred in ordering the State to pay the full capital and operating cost of magnet schools. As we noted earlier, the State's status as a violator of the Constitution compels the district court to remedy the deprivations the State has caused. In *Liddell V. supra*, 677 F.2d at 642, we held that the State could be ordered to undertake as a part of its remedial responsibility the development of magnets. Now we reaffirm that conclusion.

While we approve magnet schools and affirm the district court's decision concerning their funding, we see merit in the State's argument that careful study and planning must precede replication or expansion of magnets. New magnet schools must be approved by the Magnet Review Committee and the district court. The planning process should focus on those schools and programs that present a reasonable probability of attracting suburban white students; only those schools which demonstrate such a probability should be approved. The new schools should be phased in over a period of four years as provided for by the settlement agreement. The total number of students enrolled in city magnet schools shall not exceed 14,000.

We impose an additional limitation on the development of suburban magnets. Although a panel of this Court approved the use of suburban magnet schools in

Liddell III, supra, 667 F.2d at 658-659; and *Liddell V, supra,* 677 F.2d at 641-642, the Court en banc does not believe that the record sufficiently supports this development. The county districts may proceed on their own, of course, without state funding. Any black city students who transfer into county-funded magnet schools would count toward achieving the district's plan goal and would contribute to the district's final judgment. State fiscal incentives would include payments to districts sending transferees to county-funded magnets, but the State will not be required to pay the capital or operating costs of county magnet schools as such.

B. PART-TIME INTEGRATIVE PROGRAMS.

Part-time integrative programs are primarily intended to provide integrative learning experiences for students attending all-black schools. *Adams v. United States, supra,* 620 F.2d at 1296; *Liddell IV, supra,* 693 F.2d at 727; *Liddell V, supra,* 677 F.2d at 642. These programs have been, and should continue to be, an important element of the overall plan to integrate the city schools. In determining the need for continuing the existing programs, or developing new ones, the City Board and the Budget Review Committee must keep the above standard in mind. They must also recognize that the number of black students in nonintegrated schools will decline dramatically over the next four years. We thus approve the district court's decision insofar as it permits the continuance of part-time integrative programs and requires the State to pay full cost of the approved programs.

We do not, however, specifically approve the new or expanded programs or the dollar amounts for these programs listed in the proposed budget (items A.4.10, A.4.11,

A.5.01, A.5.02, A.5.04, A.5.05, A.6.01, A.6.03, and A.6.04). We rather require the City Board to resubmit to the Budget Review Committee, discussed *infra* Section VI, a list of the new or expanded programs that they would propose to implement. The total cost of these programs should not exceed $1 million. Further, these programs must not duplicate any programs approved in the quality education section of this opinion. Any dispute that emerges between the City Board and the State concerning these programs should be submitted for resolution by the Budget Review Committee and the district court in light of this discussion.

IV. QUALITY EDUCATION IMPROVEMENTS.

The settlement plan approved by the district court includes compensatory and remedial programs to improve the quality of education throughout the St. Louis public schools and additional programs for the same purpose in the nonintegrated schools. The district-wide improvements include a reduction in class size; restoration of art, music, physical education, and extracurricular programs; creation of pre-school centers and all-day kindergarten programs; additional staff to address the needs of handicapped students; additional nursing and counseling staff; and expansion of library and other media resources and services. Administrative improvements include curriculum and staff development, evaluation and performance assessment, and enhanced long-range planning.

The additional improvements for the nonintegrated schools include a further class-size reduction in grades K through 8, to twenty pupils per teacher; additional remedial instruction time through after-school, Saturday, and summer school programs; parental involvement programs; and alternative education options for black students unable

to attend magnet schools. Other programs address motivational needs of students in the all-black schools by stimulating opportunities for student success and recognition, by introducing role models for academic achievement, and by establishing student concerns committees to address the morale, attendance, and behavior issues which emerge during the implementation of the plan.

A. LEGAL PRECEDENT FOR INCLUDING COMPENSATORY AND REMEDIAL PROGRAMS IN DESEGREGATION REMEDIES.

This Court suggested the necessity for remedial and compensatory programs in *Adams v. United States*, *supra*, 620 F.2d at 1296, and reiterated that need in *Liddell V*, *supra*, 677 F.2d at 641-642. We thus approve them in principle as law of the case. *See supra* p. 28. Moreover, such programs have solid support in the case law as proper components of a desegregation remedy so long as they relate to the constitutional violation, are remedial in nature, and account for state and local autonomy. *Milliken II*, *supra*, 433 U.S. at 280-281.

In *Brown I*, the Supreme Court recognized that segregation harms black children by generating "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, *supra*, 347 U.S. at 494. In light of this harm, federal courts have often required the inclusion of remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems. *Milliken II*, *supra*, 433 U.S. at 283. *See, e.g., Arthur v. Nyquist*, *supra*, 712 F.2d at 811; *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 789-790 (6th Cir. 1980); *Evans v. Buchanan*, 582 F.2d 750, 767-769 (3d Cir. 1978) (en banc), *cert. denied*, 446

U.S. 923 (1980); *United States v. Texas*, 447 F.2d 441, 448 (1971); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 394-395 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); *Berry v. School Dist. of Benton Harbor*, 515 F. Supp. 344, 369-373 (W.D. Mich. 1981), *aff'd and remanded*, 698 F.2d 813 (6th Cir. 1983); *United States v. Bd. of School Comm'rs of Indianapolis*, 506 F. Supp. 657, 671-673 (S.D. Ind. 1979), *vacated in part on other grounds*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

Such programs "assist students who previously attended all-Negro schools when those students transfer to formerly all-white schools. . . . The *remedial programs . . . are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged* by the inequities and discrimination inherent in the dual school system." *Milliken II*, *supra*, 433 U.S. at 284 (emphasis in original), quoting *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817, 831 (5th Cir. 1969). Crucial to the Supreme Court's analysis in *Milliken II* is the concept that segregation not only inflicts harm on individual black students, but also builds "inadequacies [into the] * * * educational *system*." *Milliken II*, *supra*, 433 U.S. at 284 (emphasis added). Thus, to remedy the effects of a dual system which operated for decades with the sanction of law, remedial efforts must also concentrate on *systemic* educational improvements.

- A secondary remedial objective of the quality education improvements is to enhance the appeal of the city school system, thereby promoting the chances of a stable and successful voluntary desegregation plan. The exodus of white parents and students out of fear of integration, or "white flight," is no excuse for school officials to avoid desegregating. *United States v. Scotland Neck City Bd.*

of Educ., 407 U.S. 484, 491 (1972); *Monroe v. Bd. of Comm'rs*, 391 U.S. 450, 459 (1968). Yet, "there is a valid distinction between using the defense of white flight as a smokescreen to avoid integration," and addressing "the probability of white flight in attempting to formulate a *voluntary* plan which would improve the racial balance in the schools without at the same time losing the support and acceptance of the public." *Higgins v. Bd. of Educ.*, 508 F.2d 779, 794 (6th Cir. 1974) (emphasis in original); *accord Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 719 (2d Cir. 1979). A child's enrollment in a particular school is the result of two decisions: the government's student assignment, and the parents' decision to stay, move, or send their children to private school. Thus, as Professor James Coleman insists, "government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation." Coleman, *New Incentives for Desegregation*, 7 Human Rights 10, 13 (1978). Improving the quality of integrated schools consequently promotes parental acceptance of desegregation, and promotes the remedy's success. Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585, 652-653 (1983). *See also* Rossell & Hawley, *Policy Alternatives for Minimizing White Flight*, 4 Educational Evaluation and Policy Analysis 205 (1982).

The quality improvements for the all-black schools serve a further remedial objective. A strong presumption exists against the constitutional propriety of one-race schools, *Swann v. Charlotte Mecklenburg Bd. of Educ.*, *supra*, 402 U.S. at 26, and any desegregation plan leaving one-race schools must be carefully scrutinized. *Id.*; *Lee v. Macon County Bd. of Educ.*, 616 F.2d 805, 809 (5th Cir. 1980). To overcome this presumption of unconstitutionality, a court must find that the existence of one-race schools

is justified in light of the particular facts of the case and the feasibility of other desegregation techniques. *Armstrong v. Bd. of School Directors*, 616 F.2d 305, 321-322 (7th Cir. 1980); *Tasby v. Estes*, 572 F.2d 1010, 1014-1015 (5th Cir. 1978). When no other feasible desegregation techniques exist, then specific remedial programs for students in the remaining one-race schools may be included as a means of ensuring equal educational opportunity. *See, e.g., Tasby v. Wright, supra*, 713 F.2d at 95-97; *Clark v. Bd. of Educ. of Little Rock, supra*, 705 F.2d at 272.[15]

The district court held extensive hearings on the fairness of the quality education component, with lengthy testimony from local and State education officials, a number of expert witnesses, and representatives of the other parties. After reviewing the evidence and the recommendations of the court-appointed financial advisor, the court concluded that the programs fell within the proper remedial scope:

> The sole purpose for the expenditure of funds under this Plan is to carry out the constitutional responsibility to remove the vestiges of a segregated school system. * * *
>
> In no way should any funding provisions presently authorized by the Court be construed to authorize expenditures unrelated to City Board's desegregation obligations under the Constitution and the Settlement Plan as approved.

Liddell v. Bd. of Educ., supra, 567 F.Supp. at 1051-1052.

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15. The quality of an all-black school is also improved when students attend such schools voluntarily. *See* Coleman, *New Incentives for Desegregation*, 7 Human Rights 10, 14-15 (1978). The settlement plan recognizes this imperative in providing for voluntary interdistrict transfers.

B. ANALYSIS OF THE COMPENSATORY AND REMEDIAL PROGRAMS APPROVED BY THE DISTRICT COURT.

The position of the State before this Court with respect to the quality education programs is somewhat ambiguous. In its opening brief, it argued that the city and county schools had not agreed to a quality education package and that therefore the district court had nothing to approve.[16] It further asserted that

> [t]he Quality Education [component] is not only essential from a contractual point of view but also from a constitutional standing. The 15,000 black children in north St. Louis who will not have the opportunity to transfer under the Plan are still victims of constitutional wrongdoing as found by the court. The Quality Education section of the Plan is virtually the only remedy available to those black children to redress their wrong. Without it they stand as victims without redress.

State's Opening Brief at 26-27.

It concluded by stating that the court did not have the authority to modify the agreement to include the quality education component.

In its reply brief, the State changed the focus of its argument and complained that the provisions requiring improvement in the quality of education in the integrated

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16. Section IV of the settlement plan states:

> [T]he St. Louis County School districts do not have the necessary information about the city schools to form an opinion on the details of the Appendix and, therefore, they do not agree or disagree with all of the specifics in this basic design.

schools were only remotely related to desegregation. It continued to assert this position at oral argument.

The State is not a party to the settlement agreement. It thus lacks standing to question the validity of the agreement on its terms. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Fisher v. Tucson School District No. 1*, 625 F.2d 834, 837 (9th Cir. 1980). Even assuming that the State has standing to raise such a question, the district court found that the parties had a meeting of the minds with respect to the essential terms of the agreement. This finding is not clearly erroneous.

The State clearly has standing, however, to challenge the district court's funding order and did so before that court. It renews that challenge here. It argues, in substance, that the court approved funding for general educational improvements in the integrated schools which were unrelated to desegregation.[17] Its argument here is twofold. First, the State contends that these programs may only be approved if the Court can find that they would have been a part of the city school system *but for* the past unconstitutional segregation. This position mis-

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17. The State cites *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973), as support for the position that St. Louis students have no constitutional right to any particular level of education, but fails to note a critical distinction between *Rodriguez* and this case. *Rodriguez* held that property wealth is not a suspect class under the equal protection clause, and thus disparate educational expenditure levels between school districts were not a constitutional violation. Hence, the *Rodriguez* plaintiffs had no constitutional right to a particular level of education. *Id.*

Our case unquestionably involves a suspect class (race), and an established constitutional violation (a *de jure* dual school system). As noted above, courts have repeatedly endorsed compensatory and remedial efforts to overcome educational inadequacies imposed by segregated schools, *Rodriguez* notwithstanding.

reads the case law and ignores the reality of the harm imposed by segregated schools. The relevant inquiry is not whether, in absence of a *de jure* dual system, St. Louis schools would have had compensatory and remedial programs. None of the numerous cases cited above approving such programs rested on such a conclusion. The point is that compensatory and remedial education programs are necessary to remedy the effects of discrimination on the victims of segregation and the school system itself.

The second aspect of the State's argument is that there are no findings made by the district court, nor sufficient support in the record, to suggest that the quality education improvements are only *remedial* in nature.[18] The Second Circuit recently observed that the line between remedial purpose and general educational improvements unrelated to desegregation is inevitably blurred:

> [A] court is entitled to require money for programs that materially aid the success of the overall desegregation effort. A program of that sort is not disqualified for needed funding simply because its inclusion improves the overall quality of the school system. At the same time a court must be alert not to permit a school board to use a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation. Striking the bal-

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18. To clarify, relating the remedy to the violation pursuant to *Milliken II* does not require a finding that *each* educational program at issue has in the past been "infected with the discriminatory bias of a segregated school system." *Evans v. Buchanan, supra*, 582 F.2d at 769, quoting *Milliken II, supra*, 433 U.S. at 275. It is sufficient to determine that the remedial program is directed to cure the general condition offending the Constitution.

> ance necessarily requires considerable deference by a district court to the good faith representations of the school authorities * * * and by a reviewing court to the knowledgeable assessment of a district judge intimately familiar with local conditions.

Arthur v. Nyquist, supra, 712 F.2d at 813 (citations omitted).

We think that the district court's order is fully supported as it relates to the quality improvements in the nonintegrated schools. Neither the State, the United States, nor the City specifically objects to these improvements. Moreover, they are consistent with the testimony of every expert witness that testified. The reduction in class-size was viewed by the witnesses for the black plaintiffs as critical to raising the achievement levels of black students. The programs designed to intensify remedial instruction, encourage parental involvement, and promote a positive learning climate reflect the objectives that the Supreme Court approved in *Milliken II*. *See Bradley v. Milliken*, 402 F. Supp. 1096, 1118-1119 (E.D. Mich. 1975), *aff'd and remanded*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977). The schools of emphasis assist in providing equal educational opportunity by providing alternative education options for black students unable to attend magnet schools. The motivational programs are designed to bring about productive attitudes towards learning, and are essential in the opinion of expert witnesses called by the black plaintiffs. *See* Haywood, *Compensatory Education*, 59 Peabody J. of Educ. 272, 274 (1982). Crain & Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 Harv. C.R.-C.L. L. Rev. 693, 702 (1982).

Notwithstanding our affirmance in principle of the district court's order insofar as it relates to the all-black schools, we believe that the following modifications to the order should be made so that careful planning and effective implementation may proceed without disruption of the current school year:

(1) To the extent that any of the programs have been heretofore instituted, they may be continued. The remaining programs may be instituted at the beginning of the 1984-85 school year. The summer school program may be implemented for the summer of 1984.

(2) The reduction in class size from present levels to the 20:1 pupil-teacher ratio should be made over a period of four years beginning in 1984-85. The phased reduction recognizes that as many as 12,500 additional black students may transfer to county schools in the next four years, and that as many as 3,000 more black students may transfer to magnet schools during the same period. By coordinating the class-size reduction with the transfers, student and teacher disruption can be lessened and the construction or rehabilitation of school buildings to house the smaller classes minimized.

(3) The amount budgeted for item B.1.01, Coordination of Instruction, should be reduced by one-half. Evelyn F. Luckey, an expert witness for the Liddell plaintiffs, testified that the program could be successfully accomplished within the limits of the reduced amount.

(4) The schools of emphasis should be phased in over a two-year period beginning in 1984-85.

(5) Detailed planning for the programs in the all-black schools should continue so that the programs can be implemented on schedule.

We cannot fully agree with the district court's conclusion that all of the quality education improvements in all schools are closely related to the integration process. While we concur with the Second Circuit's view that a district court should show considerable deference to the good faith representations of the school authorities, and that we should show similar deference to the judgment of the district court, a review of the record leaves us with the firm conviction that the district court erred in approving many of the programs in the quality education budget.

We begin our analysis by indicating our areas of agreement with the district court. Initially, we believe there is strong support in the record for approving those programs necessary to permit the city schools to regain, and then retain, their Class AAA status. This standard is developed by the Department of Education of the State of Missouri. *See* Handbook for Classification and Accreditation of Public School Districts in Missouri (1980). Seventy-four percent of the children attending Missouri public schools attend schools that have this rating. Missouri School Directory (1982-83). The City Board was denied this rating because its classes were too large, it had too many uncertified teachers, it lacked counselors in the elementary grades, it did not provide art, music, and physical education in the elementary grades, and its library and media services were inadequate.[19]

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19. Since this Court's order of September 12, 1983, many of the changes necessary to gain a AAA rating have been implemented and the State has recently restored the AAA status to the city schools.

Second, we find adequate support in the record for preschool centers (budget item A.4.01, $811,000), and for planning and program development (a part of budget item A.1.01, $585,000). Both of these programs are recommended by the State Department of Education, and both have been shown to be closely related to the desegregation process.

Third, we find adequate support in the record for all-day kindergartens (budget item A.4.02, $6,129,000); parental involvement (budget item A.8.05); desegregation planning (budget item A.8.13, $41,000); long-range planning (budget item A.8.15, $431,000); and public affairs (budget item A.8.06, $184,000). The all-day kindergarten program serves several important compensatory and remedial objectives. Much of the testimony at the fairness hearings emphasized the importance of focusing desegregation efforts on the earlier grades, as younger children have developed fewer racial prejudices and differences in performance are narrower. *See* Hawley, *Effective Educational Strategies for Desegregated Schools*, 59 Peabody J. of Educ. 209, 214 (1982). The additional instruction time will also assist in building prerequisite skills for city pupils. The testimony also emphasized that many of the children came from single-parent families that did not provide them with the skills which would permit them to compete with other children at the first-grade level. *See Milliken II*, *supra*, 433 U.S. at 284. The all-day kindergarten program is an expensive one which must be implemented carefully if waste is to be avoided, and the full benefits of the program realized. We therefore direct that the program be phased in over a period of at least two years.

Parental involvement is similarly emphasized, both in the record and in the literature, as crucial to the success

of the desegregation plan. *See, e.g.*, Hawley, *Effective Educational Strategies for Desegregated Schools, supra*, at 212, 225-226. Because many students will not be attending their neighborhood schools as a result of the student transfers, special parent-staff seminars and other programs will be critical in developing and maintaining parental involvement. The changes involved in implementing the plan, and the future demographic and student enrollment shifts, render long-range planning essential to the successful desegregation of the city schools. The public affairs program is essential to citizen awareness and acceptance of the plan.

In light of the foregoing discussion, we approve the district court's funding order insofar as it relates to programs necessary to the city schools to retain its AAA rating. While the record is not entirely clear as to precisely what programs the State required the City Board to institute to regain this rating, it appears that they are budget items A.2.01, library and media services; A.2.02, audio visual services; A.3.01, lower class size; and A.3.02, restoration of art, music, and physical education. It is the intention of the Court that these budget items be implemented only insofar as necessary for the city schools to retain their AAA status. Retaining this status does not include a further class-size reduction in the integrated schools. We also approve the following additional programs: preschool centers, planning and program development, all-day kindergarten, parental involvement, desegregation planning, long-range planning, and public affairs.

We cannot, however, find adequate support in the record for the remaining programs. All are desirable, but the City Board has not made the case that they are necessary to provide equal educational opportunities to the

children of St. Louis, or are otherwise essential as remedial or compensatory programs.

C. CAPITAL IMPROVEMENTS IN THE INTEGRATED AND NONINTEGRATED SCHOOLS

The settlement agreement describes the age and condition of the city schools: Generally, they are in a condition of old age, rapid deterioration, and extreme deferred maintenance. Thirty-four of the nonintegrated black schools and twenty-one of the integrated schools are over fifty years old. Nearly one-fourth of the building area in the city schools is over seventy-five years old. Nearly one-half of the building area in the city schools is over sixty-five years old. More than two-thirds of the building area in the city schools is over fifty years old. At the fairness hearing, the district court heard uncontradicted evidence as to the condition of the city school facilities which paralleled that recited in the settlement agreement.

In the last twenty-four years, St. Louis voters have defeated thirteen proposed bond issues. The only bond issue to pass during this period was in 1962, and approval came only after resubmission to the voters. Significantly, both of the last two proposed bond issues were approved by a simple majority; the constitutional requirement of two-thirds voter approval, however, blocked passage of these issues.

At the fairness hearing, the State argued that more careful planning was required before renovation or new construction programs could be initiated, particularly in light of expected declining enrollment in the city schools. It also argued that the schools were in a deplorable condition because the City School Board had failed to maintain them over the years. It questioned whether certain items

were properly included in the capital improvement budget, contending that they were routine maintenance items that should be funded exclusively by the City Board.

The district court's order and memorandum did not discuss the facility improvement program at length. It simply stated that

> (b) the City Board shall submit to its voters, on or before February 1, 1984, a proposed bond issue of an amount determined by the City Board as sufficient to meet those of its capital improvement needs as are deemed necessary to meet its constitutional obligation to desegregate the City's public schools; [and]
>
> (c) should that bond issue fail to obtain the two-thirds majority vote required by State law, the Court will consider an appropriate order to obtain the funds deemed sufficient to meet the capital improvement needs of City Board in complying with its constitutional obligation to desegregate the City's public schools.

Liddell v. Bd. of Educ., *supra*, 567 F. Supp. at 1056.

Pursuant to that order, the City Board formulated a building program with a total cost of $127 million, with one-half of the total to be financed by the issuance of $63.5 million in City Board bonds.

The bond issue was presented to the voters on November 8, 1983, and fifty-five percent of the voters approved the issue. Eighty-four percent of the voters in the predominately black wards voted for the issue, but sixty-five percent of the voters in the predominately white wards voted against it. The bond issue was defeated because it failed to receive a two-thirds majority.

On appeal to this Court, the State does not question either the need to improve facilities, nor its obligation to help pay for these improvements. In its opening brief, it argues that if the bond issue fails, the whole plan will fail for lack of funding because it is unfair to expect the State to pay the full costs of the improvements. It also renews its argument that, because the county schools failed to agree to a detailed building program, the settlement agreement as a whole must fail. Finally, it asserts that, in any event, the district court is without authority to enter an order requiring a tax levy to fund the City Board's share of the improvements. In its reply brief, the State simply states that the provision of the order requiring "extensive capital improvements" is "entirely out of proportion to the constitutional violations found by the District Court."

The district court did not err in holding that the State had an obligation to pay one-half of the costs of the capital improvement program necessary to restore the city facilities to a constitutionally acceptable level, and we find no merit in the State's suggestion that the district court's order cannot stand because the county districts failed to agree to the details of the facilities improvement program. *See supra* pp. 49-50.

There is merit to the State's argument that more careful and detailed planning should precede action by the district court and that this planning should identify the projects to be undertaken, establish the cost of each project and set a more specific schedule for the improvements. Planning and scheduling are particularly important in view of the expected decline in enrollment.

On remand, therefore, the City Board should promptly identify the projects to be undertaken, estimate the cost

of each project, and set a reasonably detailed schedule for the completion of each project. The projects having the highest priority must be scheduled for completion at the earliest possible date. To that end, the City Board should consider the desirability of a referendum on a bond issue which can be initiated at a very early date and a subsequent bond issue for those projects to be built in later years. The State will pay one-half of the cost of preparing the detailed plans and schedules.

As soon as the City Board has prepared the new plans, estimates, and schedules, it shall submit them to the Budget Review Committee, discussed *infra* Section VI, and then to the district court. When the district court has approved them, a new bond issue shall be submitted to the voters. If it is defeated again, the district court shall determine how the improvements will be funded. *See infra* Section V.

V. FINANCING DESEGREGATION IN ST. LOUIS CITY SCHOOLS.

In November, 1982, Missouri voters approved a referendum (Proposition C) which directed local school officials to reduce their operating levies by an amount equal to fifty percent of the revenues local school districts would receive under a one-cent increase in the state sales tax. Mo. Rev. Stat. § 164.013 (Supp. 1983). In its July 5, 1983, order, the district court enjoined this rollback of local real estate taxes, *Liddell v. Bd. of Educ., supra*, 567 F. Supp. at 1056, and directed the Board of Education to use this money to fund the quality education programs necessary to restore the St. Louis schools to their AAA status. In our en banc order of September, 1983, we sustained the district court's injunction of the rollback on equitable

grounds, for the injunction was already in place, and reversal at that time would have seriously disrupted St. Louis's system of school finance. *Liddell VI, supra*, 717 F.2d at 1182-1184. We sustain the injunction against the rollback for the balance of this school year for the same reason. The equitable nature of that decision obliges us now to examine the propriety and the merits of the district court's injunction of the rollback with respect to years beyond 1983-84. We also consider the district court's authority to order a further increase in property taxes to fund operating expenses or capital improvements.

We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative.

The district court's use of broad equitable powers concerning school desegregation costs has been approved by previous opinions of the Supreme Court. Thus, it has declared that, when predicated on a right and a violation, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ., supra*, 402 U.S. at 15. These powers subsume a broad range of ideas and tactics: equity assures that "all reasonable methods be available to formulate an effective remedy." *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 56 (1971). These powers may also be applied broadly "to achieve the greatest possible degree of [relief] taking into account the practicalities of the situation." *Davis v. Bd. of School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971).

In *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964), the Supreme Court acknowledged that the district court may order an increase in taxes to fund schools where the State has defaulted on its obligation to provide an equal educational opportunity to all students. The Court did not limit the scope of its holding by ordering a return to the previous tax levy or procedures. It indicated only that the tax must be "necessary to prevent further racial discrimination" and that it must "raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Id.* at 233.

In *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), this Court also acknowledged the district court's remedial power to require a tax levy in excess of that authorized by the voters. When the district court ordered the consolidation of three St. Louis suburban school districts with disparate tax rates ($3.80, $4.97 and $5.38), it concluded that a uniform tax rate higher than any of the three ($6.03) would be necessary "to effectively operate the desegregated district," *id.* at 1371, and that "[t]his rate, inclusive of the amount necessary to service the total debt of the enlarged district, shall be deemed to have been approved by the voters for the purposes of Article 10, section 11(c), Missouri Constitution." *Id.* at 1372. In setting that rate, the district court also noted that "there was no reasonable possibility that such a tax levy would be approved by the required two-thirds vote in the aftermath of the desegregation order." *Id.* at 1371-1372.

On appeal, this Court sitting en banc unanimously approved a rate of $5.38, the highest rate of the three districts. Judge Stephenson, writing for the full Court, stated:

It is anomalous to suggest that the district court has the power to disestablish a dual school system but does not have the power to fashion an appropriate remedy. In *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 * * *, the court stated:

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

We have likewise held in ordering implementation of a school integration plan that "the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law." *Haney v. County Board of Education of Sevier County, supra*, 429 F.2d at 368 * * *.

We are satisfied that the district court had the authority to implement its desegregation order by directing that provision be made for the levying of taxes essential to the operation of the new school district. It is our view, however, that deference should be given to the plan submitted in good faith by the state and county officials and which was largely accepted by the court. It was the view of the state that with the receipt of anticipated funds through action of the legislature the present Ferguson rate would be adequate. Maximum consideration should be given the views of the state and local officials concerned so long as they appear compatible

> with the goals to be achieved. The maximum rate in the new district should be reduced to $5.38 per hundred.

Id. at 1372-1373 (citations and footnote omitted).

The City cites *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978) (en banc), for the proposition that the district court is without authority to order a tax increase to fund a court-imposed desegregation plan. The decision cannot be so construed. Indeed, the court en banc, relying on *Griffin*, made clear that the district court had that authority: had the State allocated "no funds, or substantially insufficient funds, to operate the remainder of the school system, such action by the State would clearly be unacceptable as interfering with the operations of the desegregation decree." *Id.* at 780. In addition, in *Evans*, the district court had acted before the "obvious inherent political safeguards * * * [were] permitted to run their course." *Id.* Our instructions on remand are entirely consistent with *Evans* because the district court must defer to the political funding process before it may consider ordering a tax increase. We read *Evans* for the proposition we stated at the outset of this discussion: a district court may require an increased tax levy, but only where necessary to remedy a violation of the Constitution, and only after exhausting all other alternatives.

The City and State also cite *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in arguing that the courts should defer to the legislative expertise of state and local governments. That case is also distinguishable. It involved an equal protection challenge of Texas's use of the property tax for funding education. The appellants claimed that this system of

taxes *per se* was discriminatory because it raised disparate revenues in different school districts according to disparities in the assessed valuation of property within the districts. The Supreme Court found no suspect class affected and no fundamental rights at stake. Instead, it relied on the "rational basis" test and deferred to legislative expertise in fiscal matters. On the other hand, in this case, the City Board and State have both been adjudged constitutional violators in matters involving a suspect classification. Moreover, in this case, no one challenges the mechanics of the tax system, which was the central issue in the passage from *Rodriguez* that the State cited.[20]

Our conviction that the district court's equitable power includes the remedial power to order tax increases or the issuance of bonds finds support in the case law surrounding the contracts clause of the United States Constitution. U.S. Const. art. 1, § 10, cl. 1. The Supreme Court has rec-

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20. The State relies on several older cases to argue that the district court may not order a tax levy to satisfy a judgment against a municipality. Each of these cases arose in a commercial context. In *United States v. County Court of Clark County*, 95 U.S. (5 Otto) 769 (1878), a bondholder sought a court-ordered tax levy to pay interest coupons for years preceding the year the bonds were issued. The Court declined to levy taxes because until the bonds were issued, the county had no obligation and no authority to levy the taxes. *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107 (1874), and *United States v. County Court of Macon County*, 99 U.S. 582 (1879), involved bondholders requesting court-ordered levies to pay for bond defaults. In both cases, the Court declined, holding the remedy barred by statutes in existence at the time the contracts of indebtedness were formed. Since the statutes became, by implication, a part of the contract, they precluded the use of the taxing remedy. Finally, in *Citizens' Savings and Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875), the Court declined to order a tax levy to pay for a default on bonds issued by a local corporation aided by the city. The Court reasoned that the tax would not have been lawful because it would not have been levied for a public purpose.

ognized that a municiality's contractual obligations cannot be impaired solely because state law restricts its powers to tax in order to meet those obligations. When the City of New Orleans raised such an argument in an attempt to avoid its debts owed to the receiver of a metropolitan police board, the Court had no trouble holding that the courts could require "the city to pay over the taxes for which the judgment was rendered, or to levy and collect a tax therefor for the benefit of the relator as receiver." *Louisiana ex rel. Hubert v. Mayor and Council of New Orleans*, 215 U.S. 170, 181 (1909). *See also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 103 S. Ct. 697, 705 n.14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations."); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 (1977) ("[T]he taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts." [Footnote omitted.]).

Similarly, courts have recognized that municipalities may not avoid their liability in tort by pleading constitutional or statutory debt limitations. *Wichita Finance and Thrift Co. v. Lawton*, 131 F. Supp. 788, 790 (W.D. Okla. 1955); *State ex rel. Martin v. Harris*, 75 N.M. 335, 115 P.2d 80, 83 (1941); *Raynor v. King County*, 97 P.2d 696, 708 (Wash. 1940); *City of Catlettsburg v. Davis' Administration*, 262 Ky. 726, 91 S.W.2d 56, 59-60 (1936); *Town of Flagstaff v. Gomez*, 242 P. 1003, 1004 (Ariz. 1926); *City of Long Beach v. Lisenby*, 179 P. 198, 200 (Cal. 1919) (taxes in such cases can be raised beyond their legal limits by the courts "without a vote of the people of said city.").

We turn to an evaluation of the district court's July 5, 1983, order in light of the foregoing discussion. We

initially note that the district court declined to order an increase in real estate levies for operating purposes until the need for such revenues had been clearly demonstrated. It also declined to order a tax increase to fund capital improvements until such time as a bond issue of an amount determined by the City Board as sufficient to meet the most pressing capital improvement needs of the Board's constitutional obligation to desegregate had been submitted to the voters. It acted properly in both respects.

It went on, however, to authorize and direct the City Board to not reduce its operating levy as required by Mo. Rev. Stat. § 164.013 (Proposition C), and to direct the State to refrain from withholding from the City Board funds that it would otherwise withhold pursuant to the same statute. It required that the revenue realized be utilized to fund the desegregation plan. It stated that any revenue thus retained but not necessary to fund the City Board's constitutional obligation should be applied to reduce its operating levy on July 1, 1984.

In our view, this order was deficient in that it was not accompanied by a factual finding by the district court that all other fiscal alternatives were unavailable or insufficient. We are unwilling to read such a finding into the record even though the record reveals that the City Board has little or no budget surplus, federal aid for desegregation has been cut, real estate values in the district have risen only slightly in recent years and referenda to secure additional funds have been largely unsuccessful.[21]

21. Since 1970, five referenda have been submitted to the voters to increase the authorized operating levy. While one requested increase passed in 1976, the remainder failed even though three of these remaining four received a majority vote. We note, however, that an increase of $ .25 per $100 of assessed valuation in the current operating levy could be approved by a simple majority of the voters. Mo. Const. art. 10, § 11(c).

On remand, the district court must allow the rollback under Proposition C to take effect for the 1984-85 school year unless it finds that no other alternatives are available or sufficient to finance its desegregation order. In addition, it shall not require any additional levy unless it makes similar findings.

Specifically, the district court should, first, promptly determine the amount of money that will be required in 1984-85 to fund the desegregation order and it should subsequently determine the funds necessary for each of the succeeding years. Second, the district court should determine whether the City Board is able, with its own resources, to fund its share of the costs. In making this determination, the district court shall consider the reduced budgetary pressures that will result from the transfer of nearly 6,000 students from city to county schools in 1984-85, and from the transfer of an additional 9,000 students in the following three years. In addition, the district court shall consider the effects of students transferring to magnet schools and of the City Board's receipt of transfer payments under the settlement agreement for sending students to county schools. Third, if the district court determines that the City Board lacks resources sufficient to fund its share of the desegregation order, it shall consider alternative sources of revenue. These alternatives include, but are not limited to: submission of a referendum to the voters for an increased operating levy; or authorization of the City Board by the State legislature to impose non-real estate taxes within the city. Fourth, if the voters refuse to approve a higher tax levy, or if the legislature fails to authorize the City Board to raise taxes from non-property tax sources, or if the City Board and the State, as joint tortfeasors, are unable to agree on an alternate method of raising the City Board's share

of the cost, the district court shall conduct an evidentiary hearing and thereafter enter a judgment sufficient to cure the constitutional violations which we have found in a manner consistent with this and prior opinions.

VI. BUDGET REVIEW COMMITTEE.

The settlement agreement, the district court's funding order and opinion, and this Court's opinion have established detailed guidelines for desegregating the city schools over the next four years. The agreement provides for a number of committees to assist in desegregation. They include the Desegregation Monitoring and Advisory Committee, the Magnet Review Committee, and the Voluntary Interdistrict Coordinating Council. The function of the latter committee is to coordinate and administer the student transfers, the voluntary teacher exchanges and the part-time educational programs. A Recruitment and Counseling Center has also been established. Each of these committees and the Center fulfill important functions in the desegregation process and may be continued and funded in accordance with the settlement agreement at the discretion of the district court.

The district court also outlined the budgeting procedures that would be followed:

> 11. For the effective and timely implementation of the Settlement Plan, as approved, the following budgeting procedure shall apply with regard to all actual and reasonable costs, except transportation costs and costs incurred for the student transfer payments made to sending and receiving districts, incurred pursuant to the approved Plan:
>
> (a) each participating school district shall deliver to State defendants a proposed budget for all

desegregation programs and activities intended for implementation pursuant to the Settlement Plan[.] * * * For * * * fiscal [year 1984-85 and subsequent years], the budgets shall be delivered to the State on or before March 1 of the preceding fiscal year;

(b) the budget for the VICC and for the Recruitment and Counseling Center (RCC) shall be filed with the Court and submitted to the State on or before * * * March 1 of the preceding fiscal year;

(c) on or before [March 15 of each preceding fiscal year], representatives of the State and of each participating district shall identify in writing their areas of agreement and disagreement relating to budgetary matters. * * * After completion of these efforts, the representatives may submit to the Court a joint statement of budgetary matters then remaining in dispute for the Court's consideration.

'T]he State shall submit in writing any objections to the budgets for the VICC and for the RCC * * * on or before March 15 of the preceding fiscal year. After completion of these efforts, the representatives may submit to the Court a joint statement of budgetary matters then remaining in dispute for the Court's consideration;

(d) the Court's financial adviser may participate in the budget meetings between the State and the various representatives, and may present comments on the budgets to the Court either in writing directly, or at any subsequent hearing that may be required; and

(e) for the 1983-1984 fiscal year, any budget disagreements that remain, after the required meetings

> and reports, will be referred to United States Magistrate David D. Noce for a hearing on or before August 5, 1983. For subsequent fiscal years, the Court will consider any remaining disputed budget issues in a manner the Court deems appropriate.

Liddell v. Bd. of Educ., supra, 567 F. Supp. at 1057.

We believe that the budgeting process is deficient in three respects: (1) it fails to require long-range budgeting; (2) it does not give the State, the principal funding source for the plan, an adequate role in the budgetary process; and (3) it fails to provide an effective method of resolving budgetary disputes before they reach the district court. As a result, that court must spend an inordinate amount of its time resolving disputes that should be resolved by the parties.

We direct that a small budget committee be named, consisting of two representatives of the State of Missouri, one representative from the city schools to be selected by the City Board, one representative to be jointly selected by the Liddell and Caldwell plaintiffs, and a court-appointed expert in school financing at the earliest possible date. The court-appointed expert shall serve as chairman of the committee. Its responsibilities will be determined by the district court but will include:

(1) Preparing, with the cooperation from the participating school districts, a budget for the 1984-85 school year through the 1987-88 school year for each element of the desegregation plan (including capital requirements and updating that budget on an annual basis). These budgets should reflect the best current estimates that can be made of the probable cost of the plan for each of the next four years. The budgets will permit the State and

the City Board to anticipate the funds that will be required to fund the plan. They will also force the participants to consider at an early date the dramatic changes that will occur in the city schools' student population in the integrated and nonintegrated schools and magnet schools, and will assist in the effort to control costs.

(2) Receiving the annual budgets prepared by the participating school districts on the same date that the budgets are to be received by the State. The State and each participating district will identify, in writing, their areas of agreement and disagreement relating to budgetary matters at a time to be determined by the court on the recommendation of the Budget Committee. The Budget Committee will make every effort to resolve differences as to the budget in accordance with the principles set forth in the settlement agreement, the district court's order and this opinion. Any unresolved disputes will be promptly presented to the district court with the recommendations of the court-appointed expert. The district court will resolve any disputes. This resolution is not an appropriate task for a United States Magistrate. The number of disputes should be dramatically reduced if the parties participate in good faith in the procedure outlined. The district court will enter an appropriate order with respect to the funding of the Budget Committee.

VII. OTHER ISSUES.

Several issues raised by various parties remain for resolution by this Court. We hold the following:

A. ST. LOUIS TEACHERS.

The district court did not err in denying the St. Louis Teachers Union Local 420 the right to intervene in

these proceedings. The Union has, however, timely raised its interest in seeking preferential hiring rights for black city teachers in county school districts, and this interest is sufficient to allow its intervention in future proceedings. *See* Fed. R. Civ. P. 24.

We note further that the settlement plan contains annual hiring goals for black teachers and administrators in the county schools. Implementation of these goals requires only nominal monetary support from the State, and provides significant benefits to the county districts and the black plaintiffs. We approve this section of the settlement plan.

B. NORTH ST. LOUIS PARENTS.

The North St. Louis Parents and Citizens for Quality Education argue that the district court erred in approving the settlement plan because it sacrifices the interests of the black students who will remain in the all-black schools for the interests of the black students who will transfer to county schools. They base their argument on the fact that the amount of state funding for students who opt to bus to county schools greatly exceeds the amount of state funding to compensate students who remain in neighborhood all-black schools.

As we have discussed, *supra* p. 47, equal educational opportunity for students remaining in one-race schools is a crucial concern in examining a desegregation remedy. The settlement plan contains significant quality improvements for the all-black schools, and we have approved these programs with minimal limitations. We find no evidence in the record to support the claim that the interests of students attending the all-black schools are being slighted. As we see the record, black students

will now have several alternatives: attend their neighborhood school, attend an integrated school in the city or county, or attend a magnet school.

Both the North St. Louis Parents and the City argue that the district court failed to provide adequate notice to potential class members. We hold that the district court did not err in this regard. Nor did it deprive the North St. Louis Parents as class members of due process by failing to respond in detail to their objections to the settlement plan. The district court's opinion reveals that it engaged in a reasoned examination of objections raised by class members concerning whether the plan is fair, reasonable and adequate. *Liddell v. Bd. of Educ.*, *supra*, 567 F. Supp. at 1042-1047.

C. THE CITY'S PETITION FOR A WRIT OF PROHIBITION, AND ITS OTHER REMAINING OBJECTIONS.

In our recent en banc order, we reserved a ruling on the City's petition for a writ of prohibition until we considered the merits on appeal. *Liddell VI*, *supra*, 717 F.2d at 1184. For the reasons discussed above, *supra* pp. 59-66, concerning the City Board's property tax rate, we deny the writ.

For reasons discussed throughout this opinion, we hold that the district court did not fail to evaluate the settlement agreement properly; we thus dismiss the City's objections on this point. The City argues further that the district court erred in denying or limiting cross-examination of experts at the fairness hearing. We find no abuse of discretion by the district court in this regard. *See* Fed. R. Evid. 611.

D. FINAL JUDGMENT FOR THE COUNTY SCHOOL DISTRICTS.

We specifically approve the settlement agreement insofar as it relieves the participating county school districts of liability if they meet the goals set forth in the settlement plan within five years.

We have considered all other arguments and find they have no merit.

CONCLUSION

The judgment of the district court is affirmed in part and reversed in part, and this matter is remanded to the district court for action consistent with this opinion. The City Board, the City of St. Louis, the North St. Louis Parents and Citizens for Quality Education, and the St. Louis Teachers Union Local 420 will each bear their own costs on appeal. All other costs of appeal shall be taxed to the State of Missouri. The mandate of this Court will issue forthwith.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part.

The Court today approves a settlement which in great part requires funding by the State of Missouri. The State of Missouri was not a party to this settlement. In the litigation before us the State has been found to be a constitutional violator insofar as there is an intra-district constitutional violation within the City of St. Louis. The Court today improperly requires the State to fund a remedy far broader than this constitutional violation, an admittedly interdistrict remedy involving

not only the schools in the City of St. Louis but the schools in St. Louis County. Accordingly, I must dissent in part.

It is necessary that we first determine what this Court has found to be the constitutional violations by the State of Missouri and then consider the nature of the remedy that may be employed in such circumstances.

I.

Even though this case has been before this Court on four earlier occasions, the nature of the constitutional violation by the State of Missouri has been outlined only most generally. In our most recent opinion, *Liddell v. Board of Education of City of St. Louis*, 677 F.2d 626 (8th Cir. 1982) (*Liddell V*), *cert. denied*, ... U.S. ....., 103 S. Ct. 172 (1983), the panel, speaking through Judge Heaney stated:

> We held in *Adams* that the state had substantially contributed to the segregation of the public schools of the City of St. Louis. No appeal was taken from that decision by the state. That decision has been settled and will not be reopened.

677 F.2d at 629. The Court there referred to the 1981 decision, *Liddell v. Board of Education of City of St. Louis*, 667 F.2d 643 (8th Cir.) (*Liddell III*), *cert. denied*, 451 U.S. 902 (1981), where the panel, again speaking through Judge Heaney stated:

> The State of Missouri vigorously contends that it should have no part in paying for the costs of integration because its actions did not violate the Constitution. . . .

> This contention is wholly without merit. In our March 3 opinion, we specifically recognized the causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system. Furthermore, we expressly directed the district court to apportion the costs of the desegregation plan among the defendants. *Adams v. United States, supra*, 620 F.2d at 1295 n.28. These statements amount to a clear reversal of the district court's findings concerning the liability of the State, and the State has chosen not to seek review of that decision in the Supreme Court. At the very least, our opinion left the district court free to review its earlier conclusions. We will not disturb its decision to do so.

667 F.2d at 654.

These opinions refered to the earlier en banc decision in *Adams v. United States*, 620 F.2d 1277 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980). In *Adams*, the Court held that the district court had erroneously concluded that the Board of Education had discharged its duty to desegregate the St. Louis school system by adopting a neighborhood school plan and refraining from discriminatory actions thereafter and that factors over which the Board of Education had no control were responsible for today's segregation in the St. Louis school system. *Adams*, 620 F.2d at 1291. The Court observed that most schools in north St. Louis were black in 1954 and remained black and that most schools in south St. Louis were white in 1954 and remained white. The Board had not dealt with the problem in 1954 to 1956 by developing a plan that would integrate the schools in north and south St. Louis. The Court concluded: "We have no alternative but to require a system-wide remedy for what is clearly a system-wide violation." *Id.*

Liddell III & V refer to the discussion on pages 1294 and 1295 in *Adams*, and footnotes 27 and 28. Testimony of Dr. Orfield that an interdistrict remedy funded by the State of Missouri would have the best chance of permanently integrating the schools in metropolitan St. Louis was discussed, together with the pre-*Brown* practices of both the St. Louis suburban school districts and those of the City of St. Louis to maintain segregated schools. The costs of the desegregation plan were to be apportioned among the defendants as determined by the district court.

It is evident that this discussion in *Adams* is dealing with the St. Louis City school system. The Board was directed to develop a system-wide plan for integrating the elementary and secondary schools. The Court remanded "to the district court with instructions to take those steps necessary to bring about an integrated school system" in accordance with certain guidelines and timetables set out. *Adams*, 620 F.2d at 1295. Cooperative transfers with suburban districts in St. Louis County were discussed.

This discussion in *Adams* does not address the question of interdistrict violation or interdistrict remedy.

This conclusion is fortified by the suggestion in *Liddell V* that "the interdistrict liability proceedings previously severed from the remainder of the case be postponed until after . . . an order in the pending 12(c) proceeding" and that "the interdistrict liability aspect should then proceed promptly thereafter." 677 F.2d at 642. The district court and this Court have not to this time made findings or conclusions of interdistrict violation.

Liddell V made the following reference with respect to the State defendants:

> [T]hey are primary constitutional wrongdoers and, therefore, can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district.

677 F.2d at 630.

The decision discussed the voluntary participation of suburban schools and the preparation and submission of feasibility plans for interdistrict desegregation involving city and suburban schools. 677 F.2d at 641.

Following *Liddell V*, the district court commenced its preparation for trial of the interdistrict issues, but before the trial could proceed and findings on the interdistrict violation and remedy issues could be made, the settlement now before the Court was achieved, with the State not participating. From this history the only conclusion that we can reach is that the constitutional violation found on the part of the State and the City of St. Louis is failure to take necessary actions to desegregate the schools in the City of St. Louis and particularly to desegregate the schools on a system-wide basis, including the predominantly white schools in south St. Louis and the predominantly black schools in north St. Louis.

II.

The scope of remedy available once a constitutional violation has been found has been discussed by the United States Supreme Court most recently in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 49 L.Ed.2d 599 (1976), in which the Court speaking through Justice Rehnquist stated:

> [I]n Swann the Court cautioned that "it must be recognized that there are limits" beyond which a court may not go in seeking to dismantle a dual school system. *Id.*, at 28, 28 L.Ed.2d 554, 91 S Ct 1267. These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation, for "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Ibid.*

427 U.S. at 434. The district court order in *Pasadena* was set aside, the Court finding that there was no showing that the post-1971 changes in the racial mix of the Pasadena schools was caused by segregative actions chargeable to the defendants, pointing to changes in the demographics of Pasadena's residential patterns. 427 U.S. 435-36.

The principles limiting available remedies were outlined in *Hills v. Gautreaux*, 425 U.S. 284, 47 L.Ed.2d 792 (1976). The Court there reviewed the earlier decision in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*). It pointed to the fundamental limitation on the remedial powers of the federal courts to restructure the operation of local and state government, and explained that that power may be exercised only on the basis of constitutional violation. *Hills, supra*, 425 U.S. at 293, 47 L.Ed.2d at 801. The Court stated that

> [o]nce a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." In Milliken, there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations com-

> mitted in the operation of the Detroit school system had had any significant segregative effects in the suburbs. (Citations omitted.)

425 U.S. at 293-94.

Hills discussed the conclusions in *Milliken I* in detail as we have demonstrated above. Further limits established by *Milliken I* are as follows:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann, 402 US, at 16, 28 L Ed 2d 554. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. at 744-45.

The Supreme Court more recently in *General Building Contractors Ass'n v. Pennsylvania*, ... U.S. ....., ..., 102 S.Ct. 3141, 3154 (1982), has held that judicial remedial powers of the federal court can "be exercised only on the basis of a violation of the law and . . . [can] extend no farther than required by the nature and extent of . . . [the] violation."

From this discussion it is apparent that the issue before this Court is what measures are tailored to fit the scope and nature of the State's constitutional violation. As we have seen, that constitutional violation is at most intradistrict in nature and, specifically, the failure to take measures to desegregate the St. Louis school system, particularly the north and south sides of that system. There is no hint of a finding that there was an interdistrict effect flowing from this intradistrict violation.

Under these principles the intradistrict violations found are insufficient to require the interdistrict remedy agreed to by all of the parties except the State of Missouri, and to impose the cost of this remedy on the State of Missouri. Because there are no findings by the district court as to the extent of the remedy required, this Court should not give its approval to a settlement placing substantial funding responsibility on the State of Missouri.

The Supreme Court in *Hills* concluded that selection of sites for public housing in the City of Chicago by HUD justified a remedy beyond the City of Chicago's territorial boundaries. The reasons for the conclusion were discussed as follows:

> Here the wrong committed by HUD confined the respondents to segregated public housing. The rel-

> evant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits. . . . An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with the "nature and extent of the constitutional violation." (citation omitted.)

425 U.S. at 299-300.

Hills does not justify the conclusion reached by this Court. In *Hills* HUD had made an expert determination that the Chicago area and not simply the City of Chicago was the relevant area. The wrongful act of HUD was confining the respondents to segregated public housing. We have no record in this case that the State of Missouri confined black students to the City of St. Louis as opposed to the county nor that the State had conceded the city and county to be the relevant area in issue. We have no finding that any of the intradistrict violations of the State which occurred within the City of St. Louis had any relationship to the county, or conversely that any acts of the State that may have been of an interdistrict nature affected the City. In *Hills* the particular facts pointed to the nature of the constitutional violation and a remedy in the larger area. *Hills* cannot support the interdistrict remedy approved by the Court today. The district court has made no findings in a vein similar to *Hills* and the Court in its opinion has reached no conclusions similar to those in *Hills* except the unsupported assertion that *Hills* justifies the remedy.

III.

The Court today bases its approval of the interdistrict transfers on the questionable ground that this issue has been previously decided. The Court's earlier decisions, in which we have discussed the nature of the constitutional violation, do not support its conclusion.

Liddell III, *supra*, 667 F.2d 643, dealt with the earlier order of the district court relating to a voluntary cooperative plan of pupil exchanges between the city and county (12(a)), a merger and full desegregation of the separate vocational educational programs in the county and city (12(b)), and development and submission of "a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." 667 F.2d at 650-51. The Court, with respect to paragraph 12(a), specifically states, "[b]ecause the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up." 667 F.2d at 651. Paragraph 12(b), relating to vocational education, was based upon a specific finding of the district court that a separate special district for vocational education was part of the State's failure to take affirmative steps to eradicate the dual system it had formally mandated, and was designed to remedy this violation.

Paragraph 12(c) in *Liddell III* relates to a suggested feasibility study and goes no farther. It recognized that to the extent that segregation was imposed by county school districts, not parties to the lawsuit and not designated as constitutional violators, it could not be considered as government-imposed. To the extent of any seg-

regation imposed by the State or other defendants "and to the extent those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so." 667 F.2d at 651. The Court's opinion, however, cited no finding and made no conclusion that city-county interdistrict segregation was imposed by the State or the City Board. Later in the opinion, the Court specifically referred to the apportionment of costs in *Adams*. *Liddell III*, 667 F.2d at 654. In discussing apportionment of costs, the Court mentioned specifically the segregation existing "in the St. Louis school system." These statements but reinforce the Court's reliance on the intradistrict violation as the basis for its action. The Court today gives an overly broad reading of *Liddell III*.

In *Liddell V*, 677 F.2d 626, the Court recognized that *Adams* held that the State had contributed to the segregation "of the public schools of the City of St. Louis." Citing *Hills*, *supra*, it then concluded that paragraph 12(a) relating to voluntary interdistrict transfers is entirely enforceable against the State defendant and that the State can be required to take actions that will further the desegregation of the city schools, even if the actions required will occur outside the boundaries of the city school district. As we have seen, the Court in *Liddell III & V* did not attempt to identify a type of constitutional violation similar to that in *Hills*, in which actions had confined a certain group of persons to one portion of the area in question, or to demonstrate a finding, concession or conclusion that the city-county area should be considered as one. The Court was considering only "a modest beginning toward voluntary interdistrict desegregation." The Court concluded in *Liddell V* that

the State and the city school board must take action to eradicate the remaining vestiges of government-imposed school segregation in the city schools. The Court's references to "actions which may involve the voluntary participation of the suburban schools" and, specifically, to "requir[ing] the state to provide additional incentives for voluntary interdistrict transfer," 677 F.2d at 641-42, were given by way of example only. The tentative suggestion that the State provide "additional incentives" is far from a conclusion that the State be required to fund a voluntary interdistrict transfer plan in which it was not a consenting party. These suggestions were made with reference to the 12(c) hearings which it suggested go forward, and which specifically related to development of a feasibility plan for overall integration. The interdistrict liability proceedings were to await this development. 677 F.2d at 642. The Court today has engaged in a massive bootstrapping effort to find that *Liddell III* or *Liddell V* has established the liability of the State for the interdistrict transfer plan.

The Court declares that we are bound by our previous holdings as to interdistrict transfers. The law of the case doctrine, however, applies with less force to prior decisions of a panel. *Van Gemmert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978); *aff'd*, 444 U.S. 472 (1980); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 at 796-97. Resting as it does on the precarious comparison with *Hills*, even if the issue were firmly established by *Liddell V*, the Court en banc should attempt to decide the case correctly rather than consistently. *See Robbins, et al v. Prosser's Moving & Storage Co.*, 700 F.2d 433, 438 (8th Cir. 1983); *United States v. Unger*, 700 F.2d 445, 450 n.10 (8th Cir. 1983); *Wrist-*

Rocket Manufacturing Co. v. Saunders Archery Co., 578 F.2d 727, 730 (8th Cir. 1978).

IV.

The State was ordered to match funds raised in a bond issue submitted to the voters by the City Board for capital improvements. The issue failed and this Court's order rather hastily approves the summary treatment of the district court with respect to this issue.

The laws of Missouri place the responsibility for maintenance of the schools' physical plant on the City Board of Education. Mo. Rev. Stat. § 177.031 (1984). This Court in its opinion correctly describes the age, deterioration and deferred maintenance of the plant. In twenty-four years thirteen bond issues have been defeated and one in 1962 approved only after resubmission. The last two bond issues were approved by a simple majority but the constitutional requirement of two-thirds voter approval has blocked passage of these issues.

There is no finding in the district court order and no conclusion by this Court that the condition of the physical plant of the St. Louis schools is related in any way to the constitutional violations of either the City Board or the State. There is nothing to suggest that the condition is other than purely and simply the result of the neglect of the City Board to fulfill its responsibilities. To order the State to pay half of this expense is to require a remedy beyond the constitutional wrong that has been found, which violates the principles laid down in *Milliken I*, *Hills* and *Swann*. This portion of the order violates the admonition of the Second Circuit in *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983), that "a court must be alert not to permit . . . use [of] a court's broad power

to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation."

There are simply no district court findings and no conclusions by this Court to justify the State's participation in funding capital improvements. This is the sole responsibility of the City Board. Certainly in the absence of any findings by the district court that the segregative policies of the State had an impact on the city schools' physical plant, that funding of additional capital improvements is necessary to redress such wrong, and that less ambitious efforts would not have been adequate, there is simply no basis to mandate this aspect of state funding.

V.

The Court today remands a portion of the funding order to the district court for further findings insofar as the district court issued specific mandates to the City Board with respect to its levy and the tax rollback. The Court, however, authorizes future specific action if the district court makes a finding that no other alternatives are available or sufficient to finance its desegregation order.

The Court need not and should not go this far. The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people. *Green v. Frazier*, 253 U.S. 233, 239, 40 S. Ct. 499, 64 L.Ed. 878 (1920). In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed.2d 256 (1964), the Supreme Court ordered local authorities to operate a public school system like that operated in other counties in Virginia and to restore a tax illegally abolished, but specifically left the manner of levy and the

amount and the means of collection to procedures under state law and standards. *See also Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969). Our earlier decision in *United States v. Missouri*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied sub. nom. Ferguson Reorganized School District v. United States*, 423 U.S. 951, 96 S.Ct. 374, 46 L.Ed.2d 288 (1975), simply permitted the tax levy to be established at the highest rate approved by voters in the largest district.

I have no quarrel with the proposition that, with proper findings that particular programs are necessary to remedy a constitutional violation that has been found to exist, a district court has the power to order the funding of those programs. The order should simply be in the form, however, to mandate that certain programs be carried out, and legislative bodies should be left with the responsibility for structuring the local or state taxing instrumentalities to achieve the result required. The federal courts go too far in mandating specific taxing procedures. I thus agree with the Court today only insofar as it mentions the option of the district court to simply enter a judgment against the State, as tortfeasor, for the amount required to fund those programs necessary to remedy the constitutional violation.

VI.

The disagreement expressed with respect to the Court's opinion today is specifically limited to those areas set forth above. The programs required by the settlement plan within the city school district, and particularly within the all-black schools, to provide a quality education for those students deprived of proper educational opportunities by the segregative actions of defendants, and the en-

hancement and enrichment programs are fully justified by this Court's earlier findings of intradistrict violation. The magnet schools and integrative programs within the City of St. Louis are similarly geared to the particular violations that were found to have occurred. Thus, the opinion of the Court in III, IV (A) and (B) approved programs that are justified by the record before the district court, and this Court, and I join the Court in these portions of its opinion. The ruling on other issues in VII (A), (B) and (C) are properly reached.

The settlement plan is an inspired and far reaching one. I express my disagreement today only insofar as the State is required to fund a portion of this program that has been the subject of agreement by other parties and not the State, where there are no findings that those portions of the program are necessary to remedy the intradistrict constitutional violation that has been found. Even if the Court were to hold today in accordance with my views I believe that a settlement would nevertheless be achieved. The county school districts profit immeasurably by the settlement agreement, as nearly all of the funding obligation is placed upon the State and they are relieved of the risk of being found to have in any way contributed to any interdistrict segregation. The State has further incentive to reach settlement as to these issues, and properly should be allowed to have a voice in the extent of the programs to be funded, because such a great portion of the expenses must be borne by the State.

BOWMAN, Circuit Judge, dissenting.

I join in Judge John R. Gibson's well-reasoned dissent concerning the lack of findings to support the interdistrict aspects of the remedy, the lack of findings to support the

requirement that the State provide funding for capital improvements in the physical plant of the City schools, and the singular inappropriateness in our Constitutional system of a federal court's ordering state and local taxing authorities to impose specific tax increases. His opinion adequately reflects my disagreement with the decision of the Court in all three of those areas. I cannot agree, however, that the remaining intradistrict aspects of the remedy approved by the Court are justified by adequate findings, and for that reason I dissent separately.

The issue in this case is not whether quality education is a good thing, or whether it would be wise public policy for the State to dedicate more of its resources to the public schools. Instead, the issue is whether, on the present record, we have the Constitutional authority to compel the State to provide funding for the array of costly programs required by the settlement plan. I submit that we do not.

The costs of carrying out the plan that the Court today approves will be enormous. For the 1984-85 year alone, the State's share of these costs is likely to exceed $49,000,000, with the City school board contributing additional funds of approximately $15,000,000. These costs, and particularly the State's share, will increase very substantially in future years as the pace of implementation quickens. If these costs are necessary to remedy a Constitutional violation, then they must be borne by the responsible parties—and ultimately by the citizens of the State—no matter how financially painful compliance may be. But if these costs go beyond what is needed to right a Constitutional wrong, if in fact the plan includes programs and amenities that may be laudable from an educational standpoint but are not tailored to the incremental segregative effects that have been caused by the Constitu-

tional violation, then the effect of the Court's decision is to transfer, without any basis in law or the Constitution, funds from taxpayers or other competing programs (including other needy school districts) to the beneficiaries of this plan. Our problem as a reviewing court is that the record gives us no basis for an intelligent and principled determination of the critical question in this case: on which side of the line—Constitutional necessity or judicial excursion into policy-making and educational experimentation—do the various components of the plan approved by the district court fall?[1]

We do not have before us a desegregation plan fashioned by the district court after careful findings of fact of the kind required by the Supreme Court in *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417, 420 (1977). Rather,

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1. A few examples will serve to illustrate the problem. The plan approved by the Court includes millions of dollars for such things as pre-school centers, all-day kindergartens, schools of emphasis (which are in addition to the magnet schools), parental involvement, and Saturday classes. The magnet school component, as presently structured, will require over $22,000,000 during the plan's first two years. During 1984-85 alone, the plan would provide $1,762,000 for an item designated "Coordination of Instruction"—whatever that may entail. It was not even mentioned, much less discussed or made the subject of fact-finding, during the hearing conducted by the district court, and the same is true of virtually all the plan's specific items. Substantial funding is provided for "Curriculum Development," "Peer Tutoring," "Shared Motivation," "Role model experiences," and "Strengthen the capabilities of the public affairs unit." The capital improvements section of the plan purports to "ensure a learning environment which complements and supports the instructional program in a manner which optimizes the learning process." While the professional educators who drafted the plan may be forgiven for writing that way, we should not be forgiven if we allow this plan to go into effect without first insisting that it be examined in the manner the constitution requires. Because of the lack of appropriate inquiry and fact-finding below, there is now no jurisprudentially acceptable way for us to determine whether any of these items are needed to remedy the Constitutional violation.

what we have before us is a desegregation plan fashioned by agreement of the City school board, the suburban school boards, and the plaintiffs. The State, which must bear the brunt of the costs, is not a party to the agreement. Over the objections of the State, the district court has adopted the agreement or plan, and it has done so without inquiring into the continuing effects of the Constitutional violation and the need for the various programs included in this plan to remedy those continuing effects.

In considering the proposed plan, the district court merely conducted a hearing to determine whether the proposed settlement plan "is fair, reasonable, and adequate for the resolution of *the 12(c) interdistrict phase* of this school desegregation case." *Liddell v. Bd. of Educ.*, 567 F. Supp. 1037, 1039 (E.D. Mo. 1983) (emphasis added). Thus the district court's inquiry was nothing more than the inquiry required under Rule 23(e), Fed R. Civ. P., to determine whether a settlement of a class action should be approved. Moreover, the inquiry was focused on the *interdistrict* phase of the case, not the *intradistrict* phase. Finding the plan satisfactory in terms of the Rule 23 considerations set forth in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975), and in Professor Moore's discussion of Rule 23, 3B Moore's Federal Practice ¶ 23.80[4] at 23-521 through 23-524, and giving a few obligatory bows to the Constitution in language wholly conclusory, the district court approved the plan and ordered all signatories, as well as the State defendants, to comply with all its provisions. 567 F. Supp. at 1042, 1055.

The district court's approach and its findings are totally inadequate to provide a Constitutional basis for its sweeping order and the only sightly less sweeping order

that this Court today approves. The Constitutional violation that has been found against the City school board and the State[2] would justify requiring them to create a unitary school system within the City school district, but it does not justify the judicially-compelled creation of a system that never would have existed even if *de jure* segregation never had been practiced in the City schools. As the Supreme Court has made clear, the remedy in a school desegregation case should restore the students in the affected school district " 'to the position they would have occupied in the absence of such conduct.' " *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citation omitted) (*Milliken II*). Similarly, in *Dayton*, *supra*, the Supreme Court has made our duty—and the limits of our authority—plain. In that case the Court was dealing, as we are dealing here, with a situation where *de jure* segregation of the races in the schools ceased many years ago. If, said the Court, Constitutional violations are found, then

> [T]he District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

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2. As Part I. of Judge John R. Gibson's separate opinion demonstrates, the exact nature of the Constitutional violation previously found in this case is not easily determined. I agree, however, with his conclusion that "he violation found on the part of the City school board and the State is failure to take adequate steps to desegregate the schools throughout the City.

> We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as 'cumulative violation' than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

Dayton, 433 U.S. at 420 (citation omitted).

In the case now before us, there has been no attempt to determine the incremental segregative effects of the Constitutional violation committed by the defendants or to compare the present City school population to what it would have been absent a violation. There has been no tailoring of the order to redress only "that difference" referred to in *Dayton* or to restore students in the City schools "to the position they would have occupied in the absence of such conduct" as required by *Milliken II*.

The district court's failure to conduct a *Dayton*-type inquiry and to make findings on incremental segregative effects has rendered it impossible for this Court properly to review the district court's order. This failure has left us without any measuring stick by which we can assess the various components of the settlement plan. The opinion of the Court implicitly recognizes this difficulty when, in searching for some standard to guide its review of certain of the compensatory and remedial programs approved by the district court, the Court resorts to a school classification device—Class AAA status—developed by the State's Department of Education as a means of rating schools, and approves programs necessary to permit the City schools to regain and retain their Class AAA status. Although the Court's need to

find a standard to which it can repair is understandable. I do not believe that the approach taken is sound. There has been no showing of any kind that in the absence of the defendants' Constitutional violation the City schools would have maintained Class AAA status. Thousands of Missouri school children, over one-quarter of the total number, attend schools that lack Class AAA status. That fact alone, when coupled with the recent restoration of the City schools to Class AAA status, casts considerable doubt on the proposition that any educational problems that may exist within the City schools are of unusual severity or that they rise to a level of Constitutional concern. In any event, we cannot simply make assumptions about the continuing harms that have flowed from the violation; rather, these harms must be determined by the kind of fact-finding by the district court and review by this Court that *Dayton* mandates.

The process by which the settlement plan came into being underscores the need for careful fact-finding before imposing the plan and its burdensome costs upon the State. In the first place, it would be a most remarkable coincidence if a plan intended to settle the broad interdistrict claims in this case was at the same time properly tailored to cure only the effects of the intradistrict violation. Moreover, it must be remembered that the negotiations leading to the plan largely excluded the State, at least during the critical latter stages when it had become apparent to the State that it could not agree to a plan of the scope and cost that the other parties were determined to achieve. The plan was expressly conditioned upon compulsory funding from the State, and all the participating school districts stood to reap substantial benefits. None of them had any real incen-

tive to prevent the others from piling their plates high with programs and funds that would benefit their school systems. As might be expected, there is no indication that the parties to the negotiations made any attempt to measure the incremental segregative effects of the violation on which the plan rests or to remedy only those effects. Such negotiations are inherently unlikely to produce a remedy narrowly tailored to the Constitutional wrong and any present-day educational deficiencies resulting therefrom that fairly may be charged to the State and, through it, to citizens in all walks of life throughout the State. Thus the need for judicial alertness, and careful fact-finding, is especially critical in this case.[3]

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3. The looseness, vagueness, and uncertainties of the plan were emphasized by one of the witnesses at the hearing before the district court:

> In nearly every program budget [of the plan], one can point to some strange budget items, some budget items which are not consistent with the description, certainly not with the planning as is in the case of many programs and I would not approve it under any circumstances until all those points were clarified, until it was clear what was expected to happen as a result of the expenditure of money, and only then if one could conclude it would not interfere so extensively with the programs in the City that they would be rendered in poorer shape than they are.

Testimony of Otis Baker, Coordinator of State and Federal Programs, Division of Instruction, State Department of Elementary and Secondary Education. Tr. of Fairness Hearing, p. 169. Another witness, an out-of-state "expert" presented by the proponents of the plan, acknowledged during cross-examination that to her knowledge there is not another urban school system in the United States that has all the components that are included within the quality education improvements contained in the settlement plan. Testimony of Carol Gibson, Director of Education, National Urban League. Tr. of Fairness Hearing, p. 1-195. One of the opponents' witnesses made the following observation concerning the quality education improvements portion of the plan:

(Continued on following page)

For the reasons stated above, I would reverse the judgment of the district court and remand the case to the district court for further proceedings consistent with this opinion. I would hope, of course, that the parties could resume their negotiations and achieve a settlement agreement to which all could assent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Footnote continued—

> This whole section of the proposal looks to be an attempt by the Saint Louis school board to justify every expense they now have and every kind of expenses they can dream up for the future, as a part of the desegregation case. We well remember their earlier attempt to have general maintenance and painting needs become a part of the start-up expenses for implementing the 12(a) plan now in effect.

Testimony of Shannon K. Burnside, President, West County Association for Neighborhood Schools. Tr. of Fairness Hearing, p. 3-49, 50.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, *et al.*,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS,
STATE OF MISSOURI, *et al.*,
Defendants.

SETTLEMENT AGREEMENT

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Appendix—Improvement of the Quality of Education Throughout the St. Louis Public Schools and Special Provision to Improve Quality in Non-Integrated Schools .....

I. Purpose and Definitions

A. Purpose

This detailed implementation plan is submitted by the signatories as an agreement to settle the litigation involving paragraph 12(c) and the plaintiffs' interdistrict claims [H(348)81, as amended; H(351)81, as amended; and H(1027)82, as amended] and to implement the Agreement in Principle H(2141)83 as required by the Court's Orders H(2142)83, H(2214)83. The establishment of programs and the funding of this settlement agreement is under the authority of paragraph 12(a) of the May 21, 1980 Order as amended as well as the orders and decisions relating thereto and the provisions contained in this agreement. The Agreement in Principle provides:

AGREEMENT IN PRINCIPLE

FIVE BASIC ELEMENTS OF A FINAL SETTLEMENT

In reviewing the five basic elements of the proposed final settlement, two preliminary points bear special mention. First, the five basic elements are at best statements of broad principles, and many significant subsidiary issues and details still must be resolved even if the parties reach an agreement on the major principles. Second, there are four critical propositions that have not yet been incorporated in five elements and that would be incorporated explicitly in a final settlement: (1) no court-ordered mandatory, interdistrict transfers of white or black students until after a hearing on liability, (2) the 23 suburban school districts in St. Louis County will continue to exist, and (3) the cost of the settlement shall be paid by such combination of State funding and a tax rate increase

in the City of St. Louis as shall be ordered by the Court, (4) black students in suburban school districts that have a minority enrollment of 50% or greater would enjoy the transfer rights.

1. *The suburban school districts in St. Louis County would agree to accept black transfer students up to their Plan Ratio within 5 years.*

   a. Under the Plan Ratio, which is employed in the 12(a) voluntary plan, a suburban school district would accept up to as many black transfer students as would constitute 15 percent of the total student population in that district, but no suburban school district would be required to accept more black transfer students than would raise the overall percentages of blacks in the total student population higher than 25 percent. The effect of the Plan Ratio may be illustrated by considering several hypothetical suburban school districts with different existing racial ratios. If Suburban School District X has a student population that is 3% black, it would accept up to as many black transfer students as would constitute 15% of the total student population in District X and the percentage of black students in District X would then be 18%. If Suburban School District Y has a student population that is 10% black, it would accept up to as many black transfer students as would constitute 15% of the total student population in District Y, and the percentage of black students in District Y would then be 25%. If Suburban School District Z has a student population that is 15% black, it would accept up to as many black students as would con-

stitute 10% of the total student population in District Z and the percentage of black students in District Z would be 25%. If a Suburban School District has a student population that is already 25% or more black, it would not be required to accept any black transfer students.

b. All student transfers under this element shall be voluntary.

c. This first element of the settlement would provide an opportunity for a substantial number of black students in the city to attend school in the county. On the basis of Fall 1980 data, application of the Plan Ratio to all twenty-three suburban school districts would provide an opportunity for approximately 17,500 black students to transfer to county schools. This estimate is probably too high because there has been a decline in total student enrollment and an increase in black enrollment after 1980, and 15,000 is a reasonable working figure.

d. One significant distinction between this first element of the settlement proposal and the 12(a) plan should be noted. Under the 12(a) plan, a suburban school district can refuse to accept black transfer students if it does not have "space available" even if it has not yet reached the Plan Ratio. There is no "space available" condition on interdistrict transfer under the proposed settlement.

e. Each school district will adopt academic and disciplinary standards to assure equitable treatment of all students.

2. *Establishment of Magnet Schools.*

   a. New magnet schools in addition to the magnet schools established under the intradistrict order and under the 12(a) plan would be created.

   b. In addition to providing special education programs for city students, the purpose of the magnet schools is to attract white transfer students from the county. If white students transfer to city magnet schools, there will be an opportunity to provide desegregated education for a larger number of black children (approximately 15,000 black students would remain in all one-race schools even if 15,000 black students transferred to county schools), and there would be greater equity in the assignment of the burdens of transportation.

   c. Unduplicated magnet programs to attract white county students and black students will be established at agreed locations in either the city or the county. No such magnet program would be established in a school district over its objection. City and county school districts would maintain autonomy over their other curriculum offerings. The final settlement agreement will describe with specificity magnet programs and their locations.

3. *Improvement of the quality of education provided by the city school system and special provisions to improve the quality of education for students in one-race schools.*

   a. The settlement will contain specific provisions for improving the quality of education provided by

the city school system and for restoring its AAA rating. No exhaustive list of specific provisions has been drafted yet, but reduction of the pupil/teacher ratio to the state's standard for an AAA rating or to county average, whichever is lower and an early childhood (birth to age 4) education program suggested in the past by the State are examples of the type of provisions under consideration.

b. Since there are now approximately 30,000 black children in one-race schools in the city, some of these students will remain in all one-race schools on the north side of St. Louis even if 15,000 black students transfer to county schools and other students attend integrated magnet schools. The settlement plan will include special provisions to improve the quality of instruction received by black students who attend one-race schools.

c. Several recent reports and documents provide a basis for assessing the needs of the city school system. *See* Desegregation Monitoring and Advisory Committee, The Effects of the City Board's Budget and Staff Reductions on the Implementation of the Desegregation Plan, January 24, 1983 [H(1982)83]; City Board's Motion to Order Adjustments in the State Funding of the Desegregation Plan, [H(1979)83]. The State's report on the AAA rating of the city school system will also provice [sic] information about needs. These reports and documents coupled with the efforts of the plaintiffs will provide a basis for drafting specific provisions to improve educational quality.

4. *Provisions to ensure that the proposed settlement will be carried out fully and fairly and that it will have a substantial impact.*

   a. It will include (1) provisions requiring the suburban school districts to recruit black transfer students from the city and to promote voluntary transfers of white county students to city schools and (2) provisions requiring the plaintiffs to promote interdistrict transfers and, (3) nonenforceable annual targets by each school district for achieving the Plan Ratio.

   b. It will also include fiscal incentives designed to encourage interdistrict transfers.

   c. All districts will adopt procedures to ensure equitable treatment of all students.

   d. FACULTY

      1. Goal: Each school district shall establish goals whereby the percentage of blacks employed as (1) teachers and (2) administrators shall equal a percentage based on the actual ratio of black and white personnel in each of such categories presently employed or on leave of absence in the city and suburban school districts or the the ratio of such black and white personnel as established by a labor market study.

      2. The goal would be accomplished through the development of an enforceable affirmative plan which shall include provisions for recruitment of black personnel and yearly hiring ratios. (1:1, 1:2. 1:3, etc.). Departures from such ratio may be justified, among other grounds, if a district demonstrates that it has hired the best qualified candidate for any position.

3. Means: (A) Normal hiring—subject to state law.

(B) Incentives for voluntary teacher transfers.

(C) If necessary, allocation by the Court of fiscal incentive funds (that would not be available to suburban school districts but for the settlement plan) to the hiring of minority teachers.

4. Obligations under this provision shall terminate at such time as either the hiring or pupil goals have been achieved.

e. The City Board would be invited to join the Cooperating School Districts for the St. Louis Suburban Area, Inc.

f. An annual report will be filed with the Court concerning the steps taken to implement the settlement.

g. The final settlement plan shall recognize

(i) That the State will, within the limits of its authority, encourage the construction of housing which shall advance the integration of neighborhoods, and

(ii) That the parties with housing responsibilities shall not take any action to interfere with the implementation of this settlement plan.

* * * As to the housing issue, there is no agreement between the State, the County, and the City Board, the Caldwell and Liddell Plaintiffs.

[Statement made by Special Master in Court]

h. Voluntary transfer students under this settlement plan shall not be assigned by the receiving district in a manner that contributes to racial segregation within the district.

i. An agreement in principle to identify options for students in majority black schools within school districts that are not predominately black to enjoy transfer rights within the district comparable to those that exist in the predominately black county districts.

5. STAY

1. Litigation will be stayed for five (5) years to permit full implementation of voluntary transfers, magnet schools, quality education, whatever teacher provisions—in essence, a stay while implementing elements 1, 2, 3 and 4. The stay will not preclude judicial enforcement of the terms of the settlement agreement.

2. Goal: The goal is a minority enrollment of 25% for districts that currently have less than a 25% minority enrollment.

3. *If a district reaches the PR within five years*, it gets a final judgment declaring that it has satisfied its pupil desegregation obligations. The plaintiffs agree to seek no further pupil desegregation relief through litigation. The school district's only continuing obligation is to comply with the specific obligations stated in elements 1, 2, 3 and 4, and to make continued efforts to reach the goal stated in paragraph 2. The Court would relinquish active supervision two years after the five-year period.

4. *If a school district does not reach the PR,* then

(a) Monitor will begin to prepare reports and recommendations, based on hearings at which all interested parties shall have the opportunity to be heard, in September of the fifth year so that the reports, the recommendations, and the negotiation process can be completed by the end of the fifth year.

(b) Parties will negotiate;

(c) Only after (a) and (b) can plaintiffs renew the litigation, in which case

(i) they must prove liability, and

(ii) they agree not to seek school district consolidation or reorganization and they agree not to seek a remedy beyond the 25% goal of paragraph 2, and any remedy would distribute the burdens of desegregation equitably, between the minority and the non-minority students in the school districts involved in the litigation under this paragraph.

(iii) In devising any remedy the Court would consider the monitor's report and it would be entitled to weight.

The Court's approval of any agreement shall determine that the Liddell, Caldwell, and the City Board Plaintiffs are entitled to "reasonable" attorney's fees and costs of litigation to be paid exclusively by the State after full hearing on attorney's fees.

B. Definitions

For purposes of this settlement agreement, the following terms are defined below:

"Enrolled" refers to those students that are enrolled in the participating districts' public schools.

"Home District" means the participating district which is the district of residence of the student transferring to another district pursuant to this plan or the district of employment of a teacher or administrator who transfers to another district pursuant to this agreement.

"Host District" is the participating district which receives a student, teacher or administrator who transfers from another district pursuant to this agreement.

"Participating District" means those school districts that are signatories to the agreement.

"Students" means kindergarten, full time elementary and full time secondary students in public schools in the City of St. Louis and St. Louis County, unless the term is specifically designated to refer to non-public school students. For the purpose of permitting voluntary interdistrict transfers by county pre-school children to the city and for the purpose of education of city pre-school children pursuant to Parts III and IV, the term "students" also includes pre-school students.

II. *Voluntary Interdistrict Transfers*

A. *Plan Goal and Plan Ratio*

1. *Definitions*

a. The "Plan Goal" is a racial ratio of 25% black students and 75% white students.

b. The "Plan Ratio" is an increase of black student enrollment of fifteen percentage points or achievement of the Plan Goal, whichever is less.

2. *Plan Ratio and Plan Goal for Each Participating District*

   a. The calculation of the plan ratio and the plan goal for each participating district is based on total resident enrollment (broken down into white resident enrollment and black resident enrollment) as of September 30, 1982 (State Report Date). Total resident enrollment for each participating district includes tuition students, and white resident enrollment includes non-black minority students. Transfer students under the 12(a) plan are not included in the resident enrollment data. Transfer students under the 12(a) plan are counted separately as part of a participating district's efforts to achieve its plan ratio and plan goal under this settlement agreement. The plan ratio and the plan goal of each participating district stated in subsections b.-c. are based on the percentage of black resident students enrolled in that participating district on September 30, 1982. The plan ratio will be used to calculate, on the basis of then current enrollment data and as set forth in section 4, the number of interdistrict transfer students that each participating district must accept.

   b. The plan ratio and the plan goal of each participating district in which the black resident student enrollment was less than twenty-five percent on September 30, 1982 are:

Participating District	Plan Ratio	Plan Goal
Affton	15.15% Black	25.00% Black
Bayless	15.15%	25.00%
Brentwood	25.00%	25.00%
Clayton	16.27%	25.00%
Hancock Place	15.34%	25.00%
Hazelwood	25.00%	25.00%
Kirkwood	25.00%	25.00%
Ladue	25.00%	25.00%
Lindbergh	15.79%	25.00%
Mehlville	15.32%	25.00%
Parkway	16.98%	25.00%
Pattonville	18.72%	25.00%
Ritenour	25.00%	25.00%
Rockwood	15.95%	25.00%
Valley Park	15.48%	25.00%
Webster Groves	25.00%	25.00%

c. The plan ratio does not apply to participating districts in which the black resident student enrollment exceeded twenty-five percent on September 30, 1982.

i. Participating districts (with their percentage black enrollment as of September 30, 1982) in which the black resident student enrollment exceeds fifty percent are: Jennings (55.10% black), Normandy (86.92% black), St. Louis City (79.47% black), University City (77.15% black), and Wellston (99.45% black). At the time this settlement agreement is approved by the Court, these participating districts, other than the City of St. Louis, are entitled to a final judgment

that they have satisfied their pupil desegregation obligations and are not covered by the affirmative action faculty obligations under Section VI A-H. The continuing obligations of these participating districts, other than the City of St. Louis, shall be limited to the establishment of such magnet programs designed to increase white student enrollment and to cooperation in the recruitment process to facilitate the transfer of black students enrolled in their district to participating districts whose enrollment is less than twenty-five percent black, consistent with the provisions of Parts II and III.

ii. Participating districts in which the black resident student enrollment exceeds twenty-five percent but is less than fifty percent are: Ferguson-Florissant (40.55% black), Maplewood-Richmond Heights (28.97% black) and Riverview Gardens (42.60% black). At the time this settlement agreement is approved by the Court, these participating districts are entitled to a final judgment that they have satisfied their pupil desegregation obligations and are not covered by the affirmative action faculty obligations under Section VI A-H. The continuing obligation of these participating districts shall be limited to cooperation in the recruitment process, consistent with the provisions of Part II, to facilitate the transfer of white students enrolled in their district

to participating districts whose enrollment is greater than fifty percent black and to facilitate the transfer of black students in their district pursuant to Section XIF hereof. If the black enrollment in any one of these three districts should exceed fifty percent, then its black students would enjoy transfer rights under Section II, and the participating district would be subject under subsection c(i) by participating districts in excess of fifty percent black enrollment as of September 30, 1982.

3. *Implementation of the Plan Ratio and the Plan Goal by Participating Districts and Determination of Annual Targets*

   a. Unless its plan ratio is achieved earlier, each participating district identified in section 2b, at the time it prepares enrollment estimates for the next school year but not later than a time to be specified by the Recruitment and Counseling Center, shall:

      i. estimate the total resident enrollment to be reported on the State Report Date, white resident enrollment (number and percentage), black resident enrollment (number and percentage) and the number of voluntary transfer students who will continue as students in the participating district.

      The total resident enrollment figure shall include tuition students. The resident white enrollment figure shall include all non-black minority students, but it shall not include

voluntary transfer students. The term "voluntary transfer students" includes all students who transferred to another district under the 12(a) plan or who transfer to a participating district under this settlement agreement. Such white voluntary transfer students shall be included in the enrollment figures of the participating district in which they actually attend school. The resident black enrollment figure shall not include black voluntary transfer students;

ii. estimate the number of black voluntary transfer students necessary to achieve its plan ratio established by section 2b. according to this formula:

$$\frac{X + Y}{X + Y + Z} = \text{Plan Ratio}$$

In this formula, X represents the number of black voluntary transfer students necessary to achieve the participating district's plan ratio, Y represents the number of black resident students as determined under subsection a(i), and Z represents the number of white resident students as determined in subsection a(i). After the number (X) of voluntary black transfer students necessary to achieve the plan ratio is determined, this number is then reduced by the number of black voluntary transfer students who have previously transferred into the participating district and who will remain enrolled in the participating district in the next school school year; and

iii. establish annual targets for achieving the plan ratio in each of the remaining years. For each year prior to the fifth year of this settlement agreement, each participating district shall determine its own annual targets based on its plan ratio, and each participating district may state preferences for particular numbers of students at particular grade levels that the Recruitment and Counseling Center may consider, in addition to the prior achievement of the plan goal by any participating district, in assigning voluntary transfer students to participating districts in a manner consistent with the voluntary transfer student's rights to choose particular participating districts and schools. Each year each participating district shall report its annual targets and preferences to the Recruitment and Counseling Center by a date specified by the Recruitment and Counseling Center. These annual targets for achieving the plan ratio are non-enforceable.

b. Each school year each participating district identified in section 2b, unless it has a plan ratio lower than its plan goal and has not yet achieved its plan ratio, shall calculate separately the number of black voluntary transfer students necessary to achieve its plan goal and non-enforceable annual targets for achieving its plan goal. This calculation shall be done consistently with the methods established in subsection a, except that the plan goal shall

be substituted for the plan ratio in the formula set out in subsection a(ii).

c. Each school year each participating district identified in subsection c(i) of section 2 shall calculate the number of white voluntary transfer students necessary to achieve its plan goal and non-enforceable annual targets for achieving its plan goal.

4. *Determination of Achievement of a Participating District's Plan Ratio*

a. At the end of each school year during the first five years of this settlement agreement, each participating district identified in section 2b. shall determine on the basis of enrollment data as of the last day of school prior to graduation the percentage of black student enrollment according to the following formula:

$$\frac{A + Y}{A + Y + Z} = \text{Percentage Black Student Enrollment}$$

In this formula, A represents the actual number of black voluntary transfer students attending a school in the participating district, Y represents the actual number of black resident students determined consistently with section 3a(i), and Z represents the actual number of white resident students determined consistently with section 3a(i).

b. The actual percentage of black student enrollment as calculated under subsection a shall be employed under Section XII in determining whether a participating district has equalled

or exceeded its plan ratio established in section 2b.

B. *Eligibility and Priorities Regarding Interdistrict Transfers Other Than To Magnet Schools and Programs*

1. *Purpose*

The purpose of this provision is to assure opportunities for interdistrict transfer for black students in the City of St. Louis who have obtained an intradistrict judgment against the City Board and the State relating to the City of St. Louis and for black students in predominantly black school districts who have had asserted on their behalf a claim for interdistrict relief in the pending litigation.

2. *Eligibility*

a. Black students who are members of the racial majority at a school in any participating district which district is 50 percent or more black in its enrollment shall be eligible to transfer voluntarily to a school and district in any other participating district in which school and district they would be in the racial minority on the conditions set out in Section II.B.3. The provisions of Section II shall govern the operation of these voluntary interdistrict transfers.

b. White students who are members of the racial majority at a school in a participating district which district is more than 50% white in its enrollment shall be eligible to transfer voluntarily to a school and district in any other

participating district in which they would be be [sic] in the racial minority.

c. Students who have demonstrated disruptive behavior in their home district will be prohibited from voluntary interdistrict transfer. Prior to the transfer of any student the home district shall issue a statement that the transferring student is in good standing and has no record of recent disruptive behavior which would interfere with the operation of the program.

d. Students who apply for interdistrict transfer who are currently withdrawn from school will be evaluated by the Recruitment and Counseling Center and permitted to transfer if there is no evidence of disruptive behavior. If there is evidence of prior disruptive behavior, these students may be permitted to transfer on a provisional basis as a probationary transfer student at the discretion of the Recruitment and Counseling Center, subject to no further disruptive behavior.

e. Handicapped students who are served by the Special School District and the City Board who are not Phase 1 students shall be provided for pursuant to the agreement between the Special School District and the plaintiffs.

f. Transfers are not limited to students in public schools.

3. *Priorities*

If in any school year, the number of eligible black students applying for interdistrict transfers ex-

ceeds the total number of spaces remaining under this settlement agreement, spaces shall be allocated among districts under the following formula:

A calculation shall be made for each majority black district of the number of black students currently attending schools that are 50% or more black in their enrollment. Ratios shall then be established for each district based upon the number of black students attending 50% or more black schools as a proportion of the total number of such students in all majority black participating districts. Spaces shall then be allocated according to the ratio. If the number of applications from any district is fewer than those it would be entitled to under the ratio, the excess spaces shall be redistributed to the remaining districts according to the same ratio.

4. The eligibility and priority provisions contained herein do not apply to magnet schools and programs. Separate eligibility and priority standards for magnet schools and programs are set out in Section III.

C. *Placement of Voluntary Interdistrict Transfer Students*

1. *Application for Transfers*

a. Each year during a period specified by the Recruitment and Counseling Center, every public school student in St. Louis City and St. Louis County who is eligible to transfer to another district will be asked to indicate if

he/she wishes to transfer to another district. Eligible white city and county public school students will be provided with information about magnet school offerings in the city and county. Eligible black city and county public school students will be given information about regular schools in predominantly white county districts and all magnet schools.

2. *Student Choice*

   a. If the student wishes to transfer he/she will complete a transfer application and return it to the Recruitment and Counseling Center by a specified date. These applications will be time-stamped and processed by the Recruitment and Counseling Center according to the provisions of this agreement.

   b. If a student indicates that he/she wishes an interdistrict transfer to a regular school, the student may:

      i. Request that the Recruitment and Counseling Center select the district and school to which the student will be assigned.

      ii. Specify up to three choices of school districts and two school choices within each district.

3. *Actual Assignment to District, School and Grade*

   a. Every effort will be made to honor each student's first choice of district and/or school. If a student has indicated no choices, other than the wish to transfer, the Recruitment

and Counseling Center will assign students first into those districts with the larger discrepancies between current enrollments and the plan goal.

b. Assignments first will be made according to the spaces in schools and grade levels identified by the host district to achieve its annual target. These will be matched against all choices indicated by the student.

c. If students remain unassigned after the above step, the host district for the student's first choice will be required to take the student as long as the placement will not exceed for that particular grade level 15% of the host district's annual target or exceed the annual target of the host district.

d. If the student cannot be accommodated in the first choice district, the same procedure applied to the first choice district in preceding paragraph c shall be applied to the second choice district if one has been indicated. If the student cannot be accommodated in the second choice district the same procedure will be applied to the third choice district, if one has been indicated.

e. If the student cannot be assigned under these conditions, or if the student does not accept the assignment provided, the student may request that he/she be placed on the waiting list for one particular district. Students on the waiting list will be processed on a first come/first served basis in accordance with the overall placement criteria.

D. Equitable Placement

1. The student's opportunities for success will be the major goal when determining student placement.

2. Voluntary transfer students shall not be assigned by the host district in any manner that contributes to racial segregation.

3. In assigning students to schools, black voluntary transfer students (except those assigned to magnets) shall not be assigned to a school in which the black enrollment exceeds by more than 15 percent the plan goal for the district as a whole.

4. The host district shall honor the grade placement for the student as certified by the home district, which shall be communicated to the parent prior to transfer. Any preliminary evaluation of the student which might suggest modification of the student's placement also will be provided to the host district prior to transfer. If, during the first semester, testing, performance, remedial efforts, and consultation with all parties in interest indicate that an adjustment of grade placement should be made, it shall be made after the first semester in consultation with the student's parents, and preferrably with parental consent.

5. School districts shall use tests that meet prevailing professional standards and such tests shall be used in accordance with the publisher's instructions.

E. Tenure

1. The commitment to accept a student shall be for the duration of the student's voluntary participation in the plan. Once a student exercises his or

her right to participate in the plan, the student will continue in said plan, subject to the provisions of subsection 3, until the student affirmatively withdraws from participation as herein set out. Students will not have to transfer each year or exercise a transfer choice to remain in the host district. Students participating in this plan shall be encouraged to continue to participate at their initial school of choice. It is expected that the student will follow the pattern of assigned schools for the resident students in the school in which the transfer student first enrolls.

2. Subject to the provisions of subsection 3, students who have elected to transfer under this plan shall remain students of the host district until they choose to return to the district where they reside.

3. Host districts shall not have the authority to remand transfer students to the home district. Host districts shall have the authority to suspend or expel a transfer student using the same due process procedures applicable to resident students.

F. Standards

1. Once admitted, transfer students will be expected to meet the same general standards, academic and other, as applied to students of the host district.

2. Information about each district's academic and disciplinary policies and procedures will be provided to the Recruitment and Counseling Center and made available to prospective transfer students on request. This should include information on pupil-teacher ratios, promotion and retention, counseling

assistance, grading, student code of conduct, disciplinary action, and suspension and expulsion.

3. The host district shall respond to the educational needs of students without regard to their status as a transfer or resident student. Transfer students shall be eligible and encouraged to participate in all school programs funded and sponsored by the host district (academic, athletic, extra-curricular and other) and shall not suffer any disability or ineligibility because they are voluntary interdistrict transfer students. Participation in after-school activities will be facilitated by the provision where needed of extra-curricular buses or other forms of transportation. This provision is not intended to require transportation to or from an evening event that occurs subsequent to and separate from the regular school day.

4. In cases involving suspension greater than ten days in length or expulsions, the Recruitment and Counseling Center shall assist students and their parents in understanding their due process rights.

5. Participating districts shall apply disciplinary standards and procedures in a nondiscriminatory manner and in accordance with the Missouri state laws on suspension and expulsion, Sections 167.161 and 167.171.

III. *Magnet Schools*

A. Purposes of Magnets

1. Preamble—Unduplicated magnet programs to attract white county students and black students will be established at agreed locations in either the city or the

county. No such magnet program would be established in a school district over its objection. City and county school districts would maintain autonomy over their other curriculum offerings.

2. The purposes of including magnet schools and programs are the following:

a. To increase the desegregation of the schools in the Metropolitan area of St. Louis.

b. To provide broader educational opportunities to students in the metropolitan area.

3. Among the assumptions guiding this proposal are the following:

a. A magnet school may be a whole staff, curriculum and facility or a part of a school, as with a magnet program. Magnet schools and programs may also be part time and may serve student populations part time at hours other than the regular school day.

b. Magnets will host students on a city and county-wide basis. Insofar as is supportive of the desegregation effort, students will have an opportunity to attend magnets.

c. No more than 20,000 students may be served by magnets, divided as follows:

i No more than 15,000 from grades 6-12

ii No more than 5,000 from pre-school to grade 5

iii Of the 20,000 students which may be served by magnets, a minimum of 12,000 shall be served by City magnets, and no more than 8,000 shall be served by county magnets.

d. The composition of student enrollment in each magnet school or program shall be 50% black and 50% white, with an allowable variance of not more than plus or minus 10%.

e. Program themes of the magnet list schools established hereunder shall be as diverse as educational planning and imagination allows, but participation of successful study at a magnet school at any level shall not prevent a student from subsequent study in different, regular fields of instruction. Thus, every magnet school shall provide basic and general academic preparation within its own site or in conjunction with nearby schools.

B. Themes

The following magnet schools and programs are authorized but not mandated for 1983-84 and 1984-85. Such list may be rearranged or reduced, but may not be expanded without review and approval by the magnet review committee:

A164

1983-84

CITY	Grade	Target Enroll.
Action Learning and Career Education	K-8	450
Foreign Language Experience School	K-8	275
Classical Junior Academy	2-8	549
Montessori I	Preschool-3	350
Expressive/Receptive Arts	K-8	450
Visual and Performing Arts Middle	6-8	315
Academic and Athletic	6-8	175
Visual and Performing Arts High School	9-12	550
Naval Jr. ROTC	9-12	400
Visual and Performing Arts Center	K-5	485
Individually Guided Ed. I	K-8	415
Individually Guided Ed. II	K-8	450
Health Careers	11-12	300
Math, Science and Technology	9-12	475
Academy of Basic Instruction I	K-8	310
Academy of Basic Instruction II	K-8	345
Academy of Basic Instruction III	K-8	410
Investigative Learning Center	K-5	415

CITY	Grade	Target Enroll.
Investigative Learning Center Middle	6-8	315
Management Academy	11-12	300
Metro High School	9-12	200
Foreign Language (Roosevelt)	9-12	450
Mass Media (McKinley)	9-12	200
Classical Academy (Soldan)	9-12	150
COUNTY		
Print and Broadcast Journalism (Kirkwood)	6-12	100
Extended Opportunity School (Clayton) (night)	9-12	200
Global Studies (Valley Park)	7-12	50
Language Arts Enrichment (Valley Park)	5-6	25
Instructional Media Laboratory School (Webster G.)	9-12	150
Television Production (Webster G.)	9-12	75
Early Childhood Microcomputer Immersion (Webster G.)	K-4	100-110
Microcomputer (Pattonville)	6-8	45-65
School Leadership (University City)	9-11	90

COUNTY	Grade	Target Enroll.
6th Grade Camp (part time) (University City)	6	880
Instrumental Music (summer) (Normandy)	9-12	200
BEST Basic (summer) (Normandy)	7-8	150
Vocational Assessment (after school/summer) (Normandy)	9-11	100
Computer Math-Language-Vocabulary (Ritenour) (Saturday)	4-6	70
1984 SUMMER		
Summer Program for Voluntary Transfer (Parkway)	1-10	400-600
Math and Science (summer) (Normandy)	6-8	100
1984-85 (In addition to 1983-84 List)		
CITY		
Foreign Language Experience School II	K-8	275
Montessori II	Preschool-3 (replicate)	400
Visual and Performing Arts Middle	6-8 (replicate)	315
Individually Guided Education I	Convert to K-5	415

CITY	Grade	Target Enroll.
Individually Guided Education II	Convert to K-5	450
Individually Guided Education	6-8 (New location)	500
Visual and Performing Arts High School (Relocate to larger facility)	9-12	1,000
Naval Jr. ROTC (Relocate to larger facility)	9-12	1,000
Military Academy Middle (New Magnet School)	6-8	400
COUNTY		
Aerospace Education (Lindbergh)	9-12	400-500
Mobile TV Production & Demo Lab (Wellston)	9-12	12-15
Business and Office Practice (Wellston)	9-12	25
Peer Counseling Institute for Students (Wellston)	?	25
Metals and Foundry (Hancock Place)	9-12	45
Early Childhood Training (Maplewood-Richmond Hgts.)	3-4 yr. olds	100
International Baccalaureate Program (University City)	11-12	100
Aerospace (Normandy)	7-8	200

C. Planning

1. New magnets or expansion of magnets already existing may be provided for the school years 1984-85, 1985-86, 1986-87 and 1987-88 under the provisions of this plan by a process as described in the following paragraphs.

2. The process for approval of new magnets or expansion of existing magnets requires that applications be filed with a magnet review committee which shall have final authority over approval or disapproval of such magnets. The magnet review committee (hereinafter sometimes referred to in Section VI as the "magnet review committee" or "the committee") will report its decision as to whether or not applications are to be approved to the applying district and the Voluntary Interdistrict Coordinating Council.

3. Applications for 1984-85 magnets may be filed with the committee immediately upon the approval of this agreement by the Court and until December 15, 1983. On or before February 1, 1984, the committee shall render its decision on 1984-85 magnets. Each year thereafter, applications shall be filed with the committee no later than December 15, for programs beginning in the succeeding fall and the committee's decision shall be rendered on or before February 1.

4. There shall be six persons serving on the magnet review committee. Two persons representing the City Board, two persons representing county school districts, one person collectively representing the N.A.A.C.P., the Caldwell Plaintiffs, and the Liddell Plaintiffs, and one person representing the State, shall constitute the review committee. The committee shall choose its chairman annually and shall make such reports to the Voluntary Interdistrict Coordinating Council as may be required.

5. The magnet review committee shall use at least these criteria in judging the applications for new magnets or expansion of existing magnets:

a. The extent to which the magnet will promote the desegregation effort.

b. The educational need of the students and the balance of educational opportunities.

c. The extent to which the magnet assists the host school district in meeting its desegregation effort under this plan.

d. The non-duplicated nature of undersubscribed magnet schools or programs.

e. The cost effectiveness of the programs related to the number of students served.

6. The district may seek approval for a planning grant for the purpose of devising a magnet school or program. The committee, in cooperation with the State Department of Education, has the sole authority to approve such grant and set the amount which shall mean that the district shall not face competition from similar planning or development effort during the period shown on the grant.

D. Evaluation

1. The magnet review committee shall biannually review the quality of magnets and report to the host school and the Voluntary Interdistrict Coordinating Council as to the improvements that are recommended in magnets and/or whether or not a magnet should be terminated. Such reports shall be included with the annually published common orientation booklet.

2. In preparation of the biannual review, the host school shall submit to the magnet review committee information on at least these criteria:

a. To the extent to which the magnet has promoted and will promote the desegregation effort.

b. The quality of the magnet as measured by student outcomes.

c. The educational need of the students and the balance of educational opportunities.

d. The extent to which the magnet assists the host school district in meeting its desegregation effort under this plan.

e. The non-duplicated nature of undersubscribed magnet schools or programs.

f. The cost effectiveness of the program related to the number of students served.

E. Planning and Evaluation of Staff

1. The magnet review committee shall be a standing committee of the Voluntary Interdistrict Cordinating [sic] Council and shall initially have the assistance of the following staff: one senior educational planner, one senior educational evaluator and no fewer than three support staff.

2. The staff shall report directly to the Executive Director of the Voluntary Interdistrict Coordinating Council and shall function to assist the review committee in its planning and review of applications and its evaluation of magnets. In addition, the staff shall coordinate with the personnel responsible for student assignment.

F. Administration

Each magnet school or program shall be under the control of the host district board of education as to theme, level, continued existence, administration, staffing, and location.

G. Protection of Local Programs

Magnet school themes and curriculum shall not be construed to prevent or inhibit the continuation of, or changes in, programs or curricula in non-magnet schools or programs.

H. Public Information

Magnet list schools shall be publicized annually in a common orientation booklet and through city-wide and county-wide visitation and presentations to interested parents and students.

I. Common Application

A common, uniform application form shall be devised by the Recruiting and Counseling Center(s) and distributed as part of the magnet orientation booklet. No one shall be admitted to a magnet school who has not completed this application.

J. Student Eligibility for Magnets

1. All students whose race is in the majority in their assigned school and district, except as provided in paragraph (d) hereof, shall be eligible for acceptance into a magnet school in a district in which their race is in the minority if: (a) their home district signs a

statement attesting to no record of recent disruptive behavior; (b) if any identified special needs are diagnosed as no more severe than Phase I; (c) they meet such qualification requirements as may have been approved by the Magnet Review Committee as specifically appropriate to some magnet themes; (d) in addition to the above, (i) white students in the City of St. Louis are eligible to attend City magnets if they are enrolled in a school in which the white enrollment is either 0-10% or over 50% and (ii) black students in majority black districts are eligible to attend magnets hosted in other majority black districts if all host district black students who have applied have been accepted and slots for black students remain in said school.

2. Students residing in the city or county who are enrolled in non-public schools shall be eligible if they meet the above conditions and if space in a magnet remains available after all public school applications have been processed for a given term.

K. Priority of Acceptance

The present enrollment of existing magnets will be given first preference. If in any school year the number of eligible black students applying for magnets hosted by a majority white district exceeds the total number of spaces remaining, the spaces shall be allocated among the majority black districts under the formula set forth in Section II.B.3.

L. Reserved Seats

Up to 30% of the seats in any magnet shall be reserved initially for eligible applicants residing and en-

rolled in the public schools of the host district. This proportion shall not be deemed a restriction on the host district enrollments and the reserve seats may be allocated to out-of-district applicants if fewer than 30% apply.

M. Continuation of Educational Programs

A student who completes one term in a magnet school in good standing within the code of conduct shall be continued in the school until graduation or until parents or guardian applies for transfer whether or not such magnet continues to be a part of this agreement.

N. Assignment and Tenure

1. If a student indicates that he/she wishes to transfer to a magnet school, the student may indicate up to three school choices.

2. Each district shall, by a date specified by the Recruitment and Counseling Center, report to the Recruitment and Counseling Center the target enrollment and available slots by grade level and race for any magnet schools operated by the district.

3. Magnet applicants will be assigned based on processing each student's choices with the slots available in the magnets. Students who remain unassigned will be placed on the magnet waiting list and processed on a first come first serve basis.

4. Students who are enrolled in magnet schools shall be eligible to apply for a transfer to other magnet schools.

5. Kindergarten pupils in magnet schools will not automatically be promoted to the first grade in that mag-

net school, except where the magnet program specifically permits.

6. Students who graduate from a magnet school shall be eligible to transfer to a similar magnet school at the next grade level with first priority and without the necessity to reapply.

7. Students who graduate from a magnet school shall be eligible to transfer to any other magnet school at the next grade level with first priority, but must reapply.

8. Students in a magnet school which is divided into several schools or expanded in grade levels shall have first priority to transfer and without the necessity to reapply.

IV. Improvement of the Quality of Education Throughout the St. Louis Public Schools and Special Provision to Improve Instructional Quality in Non-Integrated Schools

Introduction

The parties recognize the importance of the concept of the improvement of the quality of education in schools in the City of St. Louis and their responsibility to submit specific provisions concerning same to the Court. The City Board has developed a program of the kind and scope to satisfy Section III of the Agreement in Principle and it is attached hereto as an Appendix. However, the St. Louis County School districts do not have the necessary information about the city schools to form an opinion on the details of the Appendix and, therefore, they do not agree or disagree with all of the specifics in this basic design. The parties agree that the Appendix

forms a basis for setting forth a detailed implementation program to improve the quality of education in the St. Louis Public Schools. More detailed information, including budgetary matters, will be reviewed as the implementation schedule is developed and the hearing on funding provisions is held. A summary of the Appendix follows:

1. *Strengthen the Long-Range Planning Capabilities of the District*

   Proactive planning is essential to the future of St. Louis Public Schools—a school system which is experiencing declining enrollments, declining revenues and aging facilities. The school system operates within the context of a Court ordered intracity desegregation plan and is preparing to participate in a metropolitan-wide voluntary settlement plan which extends the promise of an end to Court supervision within seven years. In this complex array of circumstances, the ability of the school system to provide quality educational experiences for the children and youth of the community rests in large measure on its ability to predict future events and circumstances and to plan accordingly. The planning must be logical, systematic and comprehensive to ensure that scarce human and material resources are targeted effectively and efficiently toward the achievement of the school system's objectives. This will require the development of a strong and dynamic planning component and the service units to support it.

   The Long-Range Planning Unit will serve a central management support function and will be structured and equipped to facilitate the design of the

future of the school system. The unit will address the need for consistent and focused direction for development and implementation activities within the school system and for the coordination of objectives and activities among support units in schools. It will address the need to organize for the efficient and effective use of human and material resources. The unit will also fulfill the need to expand and utilize the findings of research and evaluation in developing projects and programs. It will facilitate planning which extends from goal-setting, needs assessment and problem analysis to the formulation of objectives and the design of strategies to achieve them. The unit will facilitate a systematic, logical approach to decision-making which draws heavily upon the analysis of data and information including demographic trends, availability of resources and evaluate feedback.

One of the major tasks of this unit will be the planning necessary to ensure the coordination of objectives and activities related to the implementation of the effective schools concept in all public schools in the City of St. Louis.

2. *Reduction of Pupil-Teacher Ratios, Staff Selection and Performance Assessment*

The pupil to classroom teacher ratios in integrated regular schools and in magnet schools will be lowered over the next five years to 25:1. The pupil-teacher ratio in non-integrated schools will be lowered to 20:1 within the next five years.

The first step in the reduction of pupil-teacher ratios throughout the school system will be taken

in 1983-84 when pupil-teacher ratios will be reduced to those in effect in 1981-82. Current pupil-teacher ratios and those proposed for 1983-84 are as follows:

1982-83	1983-84 (1981-82 Level)
Kg. — 30:1	Kg. — 25:1
1-3 — 35:1	1-3 — 26:1
4-12 — 35:1	4-12 — 30:1

Absent an allowance for the loss of students who would transfer to County districts, it is estimated that 350 additional teachers would be needed to lower the ratios as planned for 1983-84. The actual number of additional teachers needed should be considerably less than 350; however, that number can only be determined when the number of students who transfer to the County and the number of County students who transfer to the City is known. For example, should 3,000 students transfer to County districts in 1983-84 and 500 County students transfer to the City, the net loss of City students would be 2,500. This would reduce the need for additional staff to change the pupil-teacher ratios to the proposed 1983-84 levels by an estimated 93 teachers.

The reduction of pupil-teacher ratios will require the opening of additional classrooms, at least initially. As the net enrollment declines through the transfer of students to and from the County, the need for additional classrooms and additional teachers should decrease.

Should enrollments in non-integrated schools remain the same as projected for 1983-84, some 265

additional teachers would be needed to reach an interim goal of ratios of 20:1 in kindergarten, 21:1 in grades 1-3 and 25:1 in grades 4-12. However, a reduction in enrollment through the transfer of students to County districts could reduce the need for additional staff substantially.

Pupil-teacher ratios in pre-schools would be 15:1 per session for both teachers and aides.

The reduction of class size will facilitate more efficient classroom management and provide for greater time on learning tasks which is essential to the mastery of cognitive skills.

Staff Selection

Staff selection criteria and procedures will be reviewed and strengthened to ensure high standards for the selection of new staff. The criteria will, among other things, relate directly the requirements of the effective schools model, the strong emphasis on teaching basic skills and high expectation for students and staff.

Performance Evaluation

The instruments and processes for the assessment of staff performance will be evaluated and revised where necessary to assure high performance standards.

3. *Effective Schools Model*

An effective schools model which has been adopted in urban areas across the country and piloted in certain St. Louis Public Schools will be adopted as the major emphasis for all St. Louis Public Schools.

This generally accepted model identifies five characteristics of effective schools and delineates steps to take to ensure that these characteristics prevail.

(1) *Strong administrative leadership* is ensured through a self-assessment process, through appropriate inservice training and through continuous assessment of the impact leadership has on the total operation of the school.

(2) *High teacher expectations* is a two pronged thrust. Teachers must have high expectations for their own performance which flows from strong, effective administrative leadership. Of equal importance is the belief that teachers must have high expectations for students they teach. Inservice orientation for teachers will be designed to promote techniques for helping students acquire high self-expectations. Team planning, guided by inservice consultants, should provide methods which promote the positive attitudes which lead to the acquisition of basic skills.

(3) *Positive school climate,* the third characteristic of effective schools, flows from the first characteristics. Schools having strong administrative leadership, teachers with high expectations for themselves and students, and staffs that plan cooperatively have the basic elements for a positive school climate. This characteristic is specifically treated in inservice training sessions for staff and parents are also involved at this step.

(4) *Emphasis on basic skills,* another of the characteristics of effective schools undergirds the

interrelates with each of the other characteristics. All constituents—administrators, teachers, students and parents—are made aware that basic skills acquisition is a number one priority. The scope and sequence of skills adopted by the system guide each individual school as staffs work to ensure that students in their school will attain those skills which are required system-wide. Strengths and weaknesses in basic skill areas are assessed so that appropriate emphasis will be given to attaining skills where there are deficits and that skills that are acquired are maintained.

(5) *Ongoing student assessment* is also characteristic of effective schools and is carefully planned and implemented. This characteristic is ensured through participation in the system-wide testing program, of course. But of equal importance are mastery tests prepared by teachers or such tests as are integral components of curriculum materials and those assessment tools accompanying the Competency Based Education materials in use system-wide.

The implementation of the Effective Schools Model requires sufficient, well trained staff working together to provide the best possible education for future productive citizens. As the characteristics of effective schools infuse the total school system, the major goals of the system will inevitably be met.

4. *Provisions for a Full Complement of Staff*

As previously stated, the implementation of an effective schools model requires that sufficient staff

be available to schools implementing that model. The St. Louis Public School System was required because of serious financial deficits to reduce staff. This section speaks to restoring staff and ensuring that a full complement of staff is available. A previous section has addressed lowering pupil teacher ratios and providing sufficient regular classroom teachers who are carefully selected and assessed in an ongoing effort to assure effective schools.

It is a fact accepted by educators, parents, students and community that whereas the development of the cognitive basic skills is the top priority of school systems, there are additional facets of education requiring the attention of public school staffs.

Accordingly, the restoration of such specialized staff as art, music and physical education teachers will fill the void which currently exists in the provision of quality educational experience in these areas. Students will have the opportunity to develop related skills as fully as possible.

Likewise, extra-curricular programs such as intramural sports and interscholastic athletics are important in the broad context of providing worthwhile life-long interests and skills for students. To fulfill this obligation of effective education, coaching positions at the secondary level will be reinstated.

Students entering the formalized structure of first grade with prerequisite skills will profit from the emphasis on basic skills in all effective school settings. Therefore, sufficient staff to provide all day kindergarten programs for all students en-

tering the St. Louis Public Schools will be provided.

Acknowledging that there are children with handicapping conditions and further acknowledging that these children are worthy human beings deserving of the best educational services, consideration is given to providing sufficient staff to meet the educational needs of these children. Whether handicapping conditions are orthopedic, sensory, emotional or intellectual, they must be effectively addressed. Staff will be available in the public school system to address these needs to the extent required.

Support staff required for meeting basic needs of students will be reinstated as needs indicate. In this category are school nurses, social workers, psychologists and psychological examiners.

Implementing an effective schools model necessitates such ancillary staff.

Additionally, support staff at a central level required to ensure long-range planning efforts, curriculum development, staff development and evaluation and assessment of staff and students will be hired and reinstated as required.

All considerations related to raising staff to full complement will strengthen the concentrated efforts to achieve the goal of improving the quality of education throughout the school system.

5. *Curriculum Development*

A five-year plan has been developed for the revision of curriculum. Curriculum development

will be interdisciplinary in approach and will be supportive of the effective schools concept. Efforts will address the refinement of scope and sequence charts for the basic skills, the need for the frequent assessment of student progress and the means for conducting such assessments.

Curricula will also be developed for the Early Infant/Parent Centers and Pre-School Centers which will be established to serve families throughout the City. These centers will provide programs which are designed to ensure that children will be prepared to benefit fully from their educational experiences in the formal kindergarten through grade twelve program.

Measures to improve the quality of education must include efforts to ensure the access of students to adequate learning resources and a rich variety of learning experiences. The City Board proposes to improve and expand its library and other media resources and services and to conduct programs which provide access to the rich educational experiences available through cultural and other community institutions. Programs to promote computer literacy will be provided as will expanded programs in career education and cooperative education.

6. *Staff Development Division*

Strong support for curriculum development and implementation will be found in the establishment of a Staff Development Division. The major goal of the Division will be to provide effective

schools orientation, prepare staff for local school assessment relative to the characteristics of effective schools and prepare staff for planning local school strategies for the attainment of those characteristics for each school. Curriculum development and revision, the lowering of pupil-teacher ratios, the rehiring of staff, the hiring of new staff and staff exchanges, will result in significant alteractions to the environment of the classroom teacher and the building administrator and will require educators at all levels to utilize new information and/or techniques in the performance of day-to-day activities.

The Staff Development Division would have the following goals:

a. To assist in the implementation of the effective schools program in all schools within the system by providing individual school staffs with the necessary training they need to put the program into effect. By working closely with the building staff, Staff Development will ensure strong support for the effective schools program.

b. To train staff in newly developed or revised curriculum.

c. To address the specific staff training needs in non-integrated schools.

d. To address human relations needs specifically as part of the new educational environment.

e. To address any other aspects of the new educational environment in schools.

All of these goals would be pursued through the provision of inservice sessions for large groups, single school or department inservice sessions, and individualized follow-up sessions for teachers, administrators or other staff.

7. *Facilities*

The St. Louis Board of Education has a responsibility to efficiently operate, maintain and improve, where necessary, in excess of 9 million square feet of aged building facilities on over 135 separate sites, housing integrated, non-integrated and magnet schools.

The general condition of the St. Louis Public School facilities is one of rapid deterioration, extreme deferred maintenance, and general old age. This situation can better be understood by examination of some very basic data and information as follows.

Age Distribution of Basic Operating Facilities of the St. Louis Public Schools

Period of Basic Construction	Age Range	Approx. Building Area	Approx. % of Total
Prior to the turn of the century	83 to 112 yrs. old (17 bldgs.)	845,000	9%
	7 non-integrated		
	5 integrated		
	3 magnet		
	2 alternative		
Between 1900-1908	75 to 83 yrs. old (22 bldgs.)	1,434,000	15%
	8 non-integrated		
	10 integrated		
	4 school support facility		
Between 1908-1918	65 to 75 yrs. old (20 bldgs.)	1,646,000	19%
	8 non-integrated		
	6 integrated		
	6 magnet		
Between 1918-1933	50 to 65 yrs. old (31 bldgs.)	2,516,000	26%
	11 non-integrated		
	8 integrated		
	8 magnet		
	2 alternative		
	2 school support facility		

Age Distribution of Basic Operating Facilities of the St. Louis Public Schools

Period of Basic Construction	Age Range	Approx. Building Area	Approx. % of Total
Between 1933-1948	35 to 50 yrs. old (13 bldgs.)	681,000	6%
	5 non-integrated		
	3 integrated		
	2 magnet		
	3 school support facility		
Between 1948-1967	16 to 35 yrs. old (39 bldgs.)	2,238,000	24%
	28 non-integrated		
	2 integrated		
	4 magnet		
	4 school support facility		
	1 alternative		

Most notably, the data show that:

Nearly one fourth of the building area of the St. Louis Board of Education is over 75 years old. This building area alone compares to the total district building area of some of the largest and newest metropolitan area county districts.

Nearly one half of the building area of the St. Louis Board of Education is over 65 years old.

More than two thirds of the building area of the St. Louis Board of Education is over 50 years old.

Moreover, nearly one tenth of the building area of the St. Louis Board of Education was built before the turn of the century with four basic facilities over 100 years old.

The aged facilities of the St. Louis Board of Education are currently in a severely deteriorated and sometimes dilapidated physical condition and are in immediate need of not only a major deferred maintenance program, but also a general improvement, renovation and modernization program.

The Relationship of Efforts to Improve Educational Quality to the Upgrading of Facilities

Every effort should be made to ensure a learning environment which complements and supports the instructional program in a manner which optimizes the learning process. This is accomplished through providing buildings and grounds which are safe, clean, attractive, clement, healthful, efficient, and functional in terms of the current technology and teaching program laboratories.

School facilities which are not safe, clean, attractive, clement, healthful, efficient, and functional, create distractions which inhibit the learning process from a variety of perspectives. Consequently, steps need to be taken to remove such inhibitors in order to provide a milieu in which the student is free to concentrate on learning and developmental tasks and the teacher has at hand an appropriately designed and furnished space and the needed resources which will contribute most effectively to the learning process.

It is firmly believed that the above relationship is valid. Therefore, it becomes imperative that the Board obtain sufficient facilities funds to not only provide for deferred maintenance but also to initiate a comprehensive program for general renovations, associated program improvements, and modernization of its facilities.

In addition, staff reductions have impacted the Groundskeeping Division and the Building Maintenance and Repairs Division. Staff must be restored to ensure the consistent, continuous services required to maintain upgraded facilities and grounds.

8. *Evaluation and Assessment*

Key to the improvement of the quality of education is the effective use of the products of evaluation and research. The City Board's Division of Evaluation will play a greater support role in this effort. The products of this unit will provide guidance for the long-range planning efforts of the

district, the management of curriculum and instruction, the planning and provision of appropriate staff development opportunities for all staff and the continued targeting of the school district's efforts on the achievement of its educational objectives.

The implementation of the effective schools model carries with it many new assessment requirements. School staffs must assess their individual schools relative to the characteristics of effective schools. Instruments will be needed for teachers, administrators, parents and students to assess school climate. Effective schools monitor student progress frequently so that staff can be constantly aware of learning progress in relation to instructional goals and can adjust teaching efforts efficiently. All of these requirements indicate a greater reliance on the expanded use of the products of evaluation and research.

This is not to say that evaluation would concern itself simply with outcomes. Process evaluation is essential to any form of continuous corrective feedback. Working hand-in-hand with all components of the Plan, especially with Long-Range Planning, evaluation would assess such matters as the effectiveness of the management and logistics of the Plan and whether services have been reasonably planned and delivered. Only then can the human and material resources of the school district be targeted consistently upon the provision of quality educational experiences for the children and youth of the community.

Special Provisions for Non-Integrated Schools

In addition to the measures for the improvement of instruction throughout the school system from which the quality of education in integrated, non-integrated and magnet schools will be greatly enhanced, additional provisions will be made to upgrade the quality of education in non-integrated schools. Such provisions range from the establishment of pupil-teacher ratios which are lower than the reduced pupil-teacher ratios for other schools to the establishment of non-integrated schools of special emphasis. These provisions may be categorized as instructional or motivational in nature and are described briefly as follows:

1. *Instructional Programs*

   a. *Lower Pupil to Classroom Teacher Ratios*

      Subsequent to 1983-84, the City Board proposes to reduce pupil-teacher ratios in non-integrated schools to an interim goal of five students below the proposed system-wide ratios for 1983-84 and to a ratio of 20:1 within five years. This ratio is estimated to be five students below the average for county districts and the proposed ratio for regular integrated schools and magnet schools.

      Should enrollments in non-integrated schools remain the same as projected for 1983-84, some 265 additional teachers would be needed to reach an interim goal of ratios of 20:1 in kindergarten, 21:1 in grades 1-3 and 25:1 in grades 4-12. However, a reduction in enrollment through the transfer of students to County districts could reduce the need for additional staff substantially.

b. *After-School, Saturday and Summer School Experiences*

Remedial instruction and appropriate learning enrichment opportunities will be provided. Such remedial programs will provide more "time on task" in the development of cognitive skills. Enrichment experiences will be linked to courses of study and will promote the full understanding of subject matter and its various applications in the broader community which cannot be acquired in a classroom setting alone. These experiences will be designed as extensions of classroom activities rather than replications of them.

c. *Parental Involvement*

Parent and staff seminars will be instituted to promote a mutual understanding of the school's mission and parental expectations of the school. Additionally, opportunities will be provided for parents to become tutors of their kindergarten and primary grade children. The involvement of parents as partners in support of learning is an important characteristic of effective schools. Such involvement is incorporated into the effective schools model.

d. *Schools of Special Emphasis*

Resources will be provided for non-integrated schools to develop programs of special academic emphasis for individual schools. Many black students, for one reason or another, will not be able to enroll in a magnet school or

transfer to the County but still wish to receive alternative educational programs. Schools of special emphasis would be designed to meet those needs and interests.

2. *Motivational Programs*

a. *Motivational Recognition Experiences*

The motivational recognition experiences programs will provide a number of activities which will make available to pupils opportunities for success and recognition. Such activities as writing contests, debates, math competitions, science expositions and others will have motivational effects on students as well as provide numerous opportunities for them to receive recognition for both participation and achievement. These activities would be scheduled throughout the year, and would be coordinated with the curriculum in order to ensure that pupils receive maximum benefits from participation. Activities would be scheduled for pupils in grades kindergarten through grade 12.

b. *Role Model Experiences*

Students in non-integrated schools will be provided with successful role models to encourage them to continue in their academic careers. Assembly programs and other large group activities, and classroom experiences with local, state and national figures will be arranged. These experiences will be coordinated with curricular materials in such a manner as to support the regular instructional program.

Actual contacts with successful role models will encourage academic achievement, particularly in social studies and other areas which address current events.

c. *Shared Experiences Program*

Provisions will be made for the establishment of student concerns committees in each elementary and middle school. The committees of student representatives will meet regularly with the principal and will address such issues as student morale, attendance and behavior. Members will participate with staff in efforts to create a school climate which is conducive to the maintenance of an effective learning program.

V *Part-Time Educational Programs*

A. *Part-Time Ancillary Programs.* Many of the part-time ancillary programs are presently in operation in the St. Louis public schools and may be expanded to include participating districts.

Among those programs presently in operation which may be expanded are the following:

Pairing and Sharing
The Law and Education Project
Springboard to Learning
Career Education
The School Partnership Program
Ethnic Heritage
Radio Station KSLH

Another program which may be expanded for the benefit of both city and county students is the English as a Second Language (ESL) program. This program is presently operational in three schools that have been designated as ESL Centers. Students must be enrolled in the school and show need of ESL services before they can participate.

Additionally, cultural/educational institutions with long-standing and enviable records for their educational programs for school children as well as the adult community have made commitments to participate cooperatively in programs specifically designed to bring together students from city and county schools. They have well-trained staffs and well-equipped facilities for extending learning experiences beyond conventional classrooms to the broader environment of the community and the world at large, some of the institutions involved are:

KETC-TV
McDonnell Planetarium
Missouri Botanical Garden
Missouri Historical Society
Museum of Science and Natural History
Saint Louis Art Museum
Saint Louis Symphony
Saint Louis Zoo
United Nations Association
Urban League Library

The voluntary integration programs to be offered by these institutions will be a cooperative effort between each institution and the participating schools. As a first

step, the institutions will establish certain general guidelines for their respective programs and extend the opportunity for participation to schools in the city and county. Faculty members and administrators will recommend students for participation in the programs.

While the format and scope of the programs will vary from institution to institution, each will have a common denominator: To bring together racially mixed groups of students from the metropolitan area districts periodically for programs of unique educational value.

Additionally, it is envisioned that cable television could become an integral part of the metropolitan voluntary plan.

B. *Part-Time Specialty Programs.* Students enrolled in part-time specialty programs shall attend classes a half-day for a complete semester or a full year. These programs include, but are not limited to:

Honors Art
Honors Music
Transportation
Mass Media

A student may participate by enrolling in that high school or by spending one-half day in his/her home school and the other half in the high school of the specialty. Honors Art and Honors Music shall be in a school setting which houses only these programs. For these last two programs, students must spend one-half day in their home school and the other half day in Honors Art or Honors Music Programs. All specialty programs are at the secondary level.

C. *Policies and Procedures*

1. Pupils must apply for admission into part-time specialty programs and will be admitted on a first-come, first-served basis with consideration being given to racial balance.

2. Part-time ancillary program experiences will be cooperatively planned and implemented by staff at the participating schools and institutional staff where appropriate with due consideration being given to racial balance.

VI. *Faculty*

A. *Definition of Teacher and Administrator*

1. As used herein, the term "school district shall apply to each and every school district which is a signatory to this agreement.

2. As used herein, the term "teacher" shall include all certificated staff except certificated administrators. The term "administrator" as used herein, shall include all administrators, whether certificated or not.

B. *Purposes*

1. Recruitment and selection of newly hired employees and the terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate against black people because of their race.

2. To increase the number of black applicants who satisfy the school district's standards for employment.

3. To implement a system for monitoring and recording school district efforts to secure black applicants for teachers and administrators.

4. To seek to achieve a goal in its staff of teachers a work force of at least 15.8% black.

5. To seek to achieve a goal in its staff of administrators a work force of at least 13.4% black.

C. *Recruitment of Teachers and Administrators*

The school district shall be reasonable for recruiting black applicants for employment as teachers and administrators using any reasonable means available to it. The school district shall keep records to show how this section has been implemented and to report in the annual report specified herein in Section F herein the steps taken pursuant to this section.

D. *Application and Selection Procedures*

1. The school district shall initiate and maintain a record system sufficient to identify for each applicant, his or her identity, race, position(s) applied for, position(s) considered for, disposition, the source of the applicant's knowledge of the job opening, the date the application was received and any other information required to satisfy the provisions of Section F hereof.

2. The school district will retain an affirmative action file on all black applicants.

3. Whenever the school district has a vacancy, the Affirmative Action file shall be reviewed to identify qualified black candidates for consideration for such vacancy.

E. *Annual Hiring Goals*

Subject to the provisions of paragraphs 1 and 2 hereof, the following hiring goals for the employment of new teachers and administrators, to be judged on an annual basis, shall be applied:

Number of New Hires	Ratio—New Hires
1 through 9	1 black: 2 white (33 1/3%)
10 through 20	1 black: 3 white (25%)
21 through 50	1 black: 4 white (20%)
51 or more	1 black: 5 white (16.6%)

For example, if in any year a district hired 17 teachers and/or administrators, the first 9 hires would be 3 black and 6 white and the next 8 hires would be 2 black and 6 white.

Each school district shall report to the Voluntary Interdistrict Coordinating Council and plaintiffs' counsel the number and percentage of teachers and administrators as of the effective date of this agreement, such report to be filed thirty days after such date.

1. Nothing contained in this agreement shall be construed to require the employment of unqualified teachers or the discharge or replacement of any teachers employed by a school district.

2. School districts shall be obliged to use their best effort to attain the goal and above stated annual hiring goals. Failure to attain the goal or annual hiring goal may be justified, among other reasons, if a district demonstrates that such failure was because it hired the best qualified candidate for each position.

F. *Reporting and Enforcement*

Commencing October 1, 1983 and annually thereafter, each school district shall file a report covering teachers and administrators with the Voluntary Interdistrict Coordinating Council and each of the plaintiffs' counsel herein, containing total number of new hires, total white

new hires, total black new hires, positions filled with new hires, rate of pay and total applications received in that year broken down between white and black applicants. The first such report shall contain such information for the period from the date of this agreement to September 15, 1983 and each subsequent annual report shall cover the period from September 16, to the following September 15.

If a district's annual hiring goal is not met and upon request of plaintiffs or their counsel each school district upon receiving such request shall provide within a reasonable time the following additional information, which shall not include the name of any person hired or of any applicant for employment:

1. Positions filled during the reporting period showing race, date of hire, position hired into, rate of pay, and reason for selection;

2. All applicants for positions filled during the reporting period showing race, date of application, position applied for and position considered for, reason for the rejection of other applicants for the position filled and date decision was made. If a district's annual hiring goal is not met and if plaintiff's counsel desires additional information to that previously provided pursuant to the terms hereof, plaintiff's counsel shall have reasonable access to these documents upon request to the school district's counsel and upon mutually agreeable terms.

The school district shall retain all applications, correspondence, applicant logs, interview sheets and all other documents relating to any application for employment and the basis for selection or rejection of any applicant, including the name and address of each individual applicant and/or person employed.

The provisions of this settlement agreement relating to the recruitment and employment of black teachers and administrators are subject to judicial enforcement; provided, however, except for good cause asserted, counsel for the movant, prior to seeking judicial enforcement, shall first confer with the school district's counsel or make reasonable efforts to do so, in an attempt to resolve any differences.

Nothing contained herein shall preclude any individual who believes he/she has been discriminated against because of race from asserting such claim in an appropriate forum whether or not this agreement's hiring or pupil goal has been met.

G.

All obligations pursuant to this agreement relating to hiring of black teachers and administrators, including the reporting requirements in Section F hereof, shall terminate at the time the hiring goals of 15.8% black teachers and 13.4% black administrators is reached, or the pupil goal of 25% black students is reached, whichever occurs earlier. The meeting of such goal or goals shall be documented by data reported to the Voluntary Interdistrict Coordinating Council and plaintiffs' counsel.

H. *Duty to Follow State Law*

Nothing herein shall require a district to violate any provisions of Missouri law and, in particular, the Missouri Teacher Tenure Act, as amended, applicable to both six director and Metropolitan school districts; provided however, in filling vacant teacher positions, districts shall use to the extent required and at their request, desegregation funds as may be ordered by the

Court and received by the districts because of their participation in this settlement agreement to fill such vacant positions through new hires of blacks to meet the annual goal set forth in Paragraph E.

4. I. *Teacher Transfers and Exchanges*

Voluntary interdistrict transfers of teachers will also be used to attain affirmative action goals when such transfer results in movement toward a district's annual affirmative action goal.

Voluntary teacher exchanges will be encouraged to enhance desegregation efforts.

a. Purpose

The purpose of the teacher transfer and exchange program among metropolitan and county school districts is to enhance racial teacher balance and teacher integration experiences in the districts. Another purpose of this program is to foster attitudes of responsiveness, cooperation, and innovation in meeting educational challenges.

b. Conditions

i. The exchange teacher shall remain an employee of the home district and will receive from the home district the scheduled salary and fringe benefits to which he/she is entitled as an employee of that district. Existing liability insurance agreements of districts shall be appropriately amended prior to any exchange or transfer to provide continued coverage for the exchange or transfer teacher.

ii. Any teacher who volunteers has the right to maintain affiliation with professional associations of his/her choice.

iii. Teacher tenure status shall not be affected by the special assignment to another school district.

iv. Personnel policies normally provided to teachers in the receiving district shall be given to exchange or transfer teachers.

v. The teacher shall receive from the host district mileage reimbursement for job related functions that others in similar positions receive. No mileage reimbursement shall be provided for travel to and from the worksite and the teacher's home.

vi. The school calendar of the host district shall be totally followed by the exchange or transfer teacher. The effective date of assignments beginning in the fall shall be determined by each district's calendar. When the beginning dates of the districts' second semesters do not coincide, the effective date of the exchange shall be the latter of the two for both exchange teachers. The effective date of administrative changes shall be agreed upon by the participating districts.

vii. Selection procedures may provide for visitations and interviews prior to acceptance by any of the parties involved.

viii. The exchange or transfer teacher's period of assignment shall be mutually agreed upon

by the home and host districts. The exchange teacher is expected to serve full term of the exchange or transfer agreement. Should a request for transfer be submitted by the exchange or transfer teacher before the end of the agreed-upon term, the request shall be reviewed and action agreed upon by the home and host districts prior to any final determination.

ix. In the event of an exchange teacher's absence, the host district shall provide the substitute teacher, and the home district shall pay the costs of a substitute teacher as billed at the scheduled rate of the host district for the balance of the period of the exchange.

x. Supplemental assignments of exchange teachers are permissible and may be made by either district during the exchange period. Extra-duty pay for all services performed in the host district shall be forwarded to the home district for deposit. The home district shall assume responsibility for making necessary employee deductions before issuing a check for the extra-duty assignment.

xi. The teacher exchanges and transfers shall be limited to full-time, tenured staff, except by mutual agreement of the individual districts involved.

xii. The evaluation of exchange and transfer teachers shall be as mutually agreed to by the home and host school districts.

xiii. The exchange or transfer teacher shall be expected to return to the home district at the

end of the exchange or transfer assignment period.

xiv. When the exchange or transfer teacher returns to the home district, assignments will be based upon the home district's policies and procedures.

xv. An exchange or transfer teacher shall receive on a one time basis only a monetary bonus for the completion of one full school year of service under this section, such sum as may be agreed upon by the host and home districts.

xvi. The host district shall pay the transfer teacher's remuneration, including the cost of a substitute teacher's salary.

xvii. All transfers and exchanges shall be subject to the approval of both the home and host districts.

VII *Parent Involvement*

A. Each participating district shall encourage the parents or guardians of students transferring into or out of their district to participate in the educational process and shall not be restricted from or denied access to activities and processes provided to resident parents. In this regard, additional steps may be initiated by the district to foster this positive relationship. Among the areas which may require special attention by the districts are the following:

1. Parents may need an opportunity before the student transfers to visit the host school and meet the

staff, particularly the student's teacher(s), in a supportive milieu that encourages further interest and participation.

2. Parents should be encouraged to participate actively in the parent organizations of the host school and district.

3. If transportation presents a problem for the parent, assistance might be arranged through carpools or other means as the district may decide.

4. Opportunities for evening conferences between teachers and parents could be provided.

5. Parents need to be informed about academic policies and discipline code procedures before the student completes the transfer process.

B. A parent advisory council under VICC with representation from all participating districts, which includes parents of resident and transfer students, may be constituted on an annual basis. This council shall provide assistance to the Voluntary Interdistrict Coordinating Council in addressing parent and student concerns about the interdistrict voluntary plan.

VIII. *Transportation*

1. The Missouri State Department of Elementary and Secondary Education shall:

a. Provide transportation for interdistrict transfer students enrolled and participating in regular or magnet programs who reside more than one mile from the school site;

b. Provide transportation for students enrolled and participating in part-time ancillary programs and half-time specialty programs.

2. Any district may request to manage the transportation of their voluntary transfer students or voluntary transfer students attending other districts; and if such a request is made, the State shall approve the same if it is cost effective and can be assimilated into the state operated transportation program.

IX. *Administration*

A. *Establishment and Purpose of Voluntary Interdistrict Coordinating Council.*

1. A Voluntary Interdistrict Coordinating Council ("VICC") shall be established as provided herein.

2. The purpose of the VICC is to coordinate and administer the student transfer and voluntary teacher exchange provisions of the settlement agreement. The VICC shall have no authority or responsibility for the operation of the school districts which are parties to this agreement, and it is hereby expressly understood and agreed that all such authority and responsibility remains with the duly elected board of education for each school district, as provided by law. The VICC shall have no power to alter or amend the terms and provisions of the settlement agreement. The VICC shall have no powers beyond those expressly granted to it herein, or as may be granted to it by any amendment to the settlement agreement duly authorized by the unanimous consent of the parties and with approval of the Court.

B. *Membership*

1. The VICC shall have the following voting members:

a. One person selected by each school district which is a party to this agreement;

b. One person each selected by the National Association for the Advancement of Colored People ("NAACP") and by the Liddell plaintiff group as parties to this agreement; and

c. One person employed by the State Department of Elementary and Secondary Education, or its successor, selected by the Commissioner of Education, or his successor.

2. The VICC may, in its discretion, invite teacher, parent and other interested organizations to select representatives to participate in the activities of the VICC as non-voting members.

3. Each appointing authority shall also select an alternate representative to the VICC. The alternate shall have the same power and authority as regular members in the absence of the regular member.

4. Each regular and alternate member shall serve for a term of one year. Each appointing authority shall name its initial representatives to the VICC within ten days after approval of this agreement by the Court.

C. *Voting*

Each person appointed pursuant to paragraph IX.B.1. shall be entitled to one vote on each matter submitted to a vote of the VICC. On all questions a majority of the VICC voting shall decide the issue. Alternate members shall have the right to vote in the absence of the regular member.

D. *Quorum*

A quorum shall consist of a majority of the voting members. Official business of the VICC shall be conducted in the presence of a quorum and not otherwise.

E. *Meetings*

1. The VICC shall determine the time, place and date of its meetings, and members are to be considered informed thereof by the action taken by it in making such determinations. Notice of meetings may be confirmed by the Executive Director. In addition, the Chairman, the Vice-Chairman in the Chairman's absence or a majority of the voting members may call special meetings upon appropriate notice to members of the time, place and purpose of the special meeting. The special meetings shall be limited to the purpose stated in the notice unless otherwise agreed by the members.

2. The VICC shall follow and be governed by the provisions of Chapter 610 RSMo. 1982 Supp, as it may be amended or revised from time to time, with respect to its meetings, votes and records.

F. *Officers*

1. The VICC shall elect a Chairman, Vice-Chairman and Secretary from its voting members to serve for a period of one year. No person shall be precluded from holding office because he previously held such office. These positions should rotate among the voting members and parties to this agreement. The position of Chairman shall be held by the City Board representative at least once during the first five years.

2. The Chairman shall have general supervision of the proceedings of the VICC. The Chairman, or in his/her absence, the Vice-Chairman, shall preside at all meetings of the VICC. The Chairman

and Vice-Chairman may perform other duties as may be prescribed by the VICC.

3. The Secretary shall keep, or supervise the keeping of, the minutes of the VICC meetings; be responsible for the giving of all appropriate notices; and act as the official custodian of the records of the VICC.

G. *Staff*

1. a. The VICC shall select an Executive Director who shall report directly to the VICC.

   b. The Executive Director shall be responsible for the daily supervision and operation of the overall administrative duties of the VICC.

   c. The Executive Director shall, with the approval of the VICC, employ such full-time and part-time staff as may be necessary to carry out the duties of the VICC.

   d. The Executive Director shall appoint, with the consent of the VICC, a Recording Secretary to take and transcribe the minutes of VICC meetings. The Recording Secretary shall serve upon terms to be determined by the VICC.

   e. The Executive Director shall be an *ex officio* member of the VICC without vote.

2. The VICC shall select a Director of Student Recruitment and Counseling. The Director of Student Recruitment and Counseling shall have primary responsibility for the daily supervision and operation of the Student Recruitment and Counseling Center established herein and shall report to the VICC through the Executive Director.

H. *Fiscal Authority*

1. The VICC may authorize the Chairman, Vice-Chairman or Executive Director to enter into any contract or execute any instrument in the name of the VICC. Such authority may be general or confined to specific documents. All contracts, instruments, or other obligations shall be in writing, and shall be presented to the VICC for approval before being executed. Nothing herein shall be construed so as to impose any personal liability upon the members of the VICC for any such contracts, instruments or obligations.

2. All checks, drafts or orders for the payment of money, notes or other evidences of indebtedness issued in the name of the VICC shall be signed by the Executive Director and countersigned by the Chairman. In the absence of the Chairman, either the Vice-Chairman or the Secretary may countersign such instruments. At least once each month, the Executive Director shall present to the VICC the vouchers payable for its review and approval. The Executive Director may establish a petty cash fund from which disbursements may be made by the Executive Director pursuant to guidelines approved by the VICC. The Executive Director's authority is limited to budgeted amounts for expenditures as approved by the VICC.

3. All funds of the VICC shall be deposited to its credit in such banks, trust companies or other depositories as the VICC may select.

4. The VICC may, in its discretion, contract with any school district which is a party to this agree-

ment to act as the VICC fiscal agent, or to provide other fiscal services as may be approved by the VICC.

5. The VICC fiscal year shall be from July 1 to June 30 annually.

I. *Rules, Operating Procedures and Forms*

The VICC shall adopt such reasonable rules, operating procedures and forms as it may deem necessary or appropriate to fulfill its functions under the settlement agreement, and as may be consistent with the terms of the settlement agreement. All such rules, operating procedures and forms may be modified, from time to time, consistent with the settlement agreement.

J. *Powers*

1. The VICC and its staff, in cooperation with the parties to this agreement, shall develop procedures to implement the student transfer and teacher exchange provisions of this agreement. The procedures shall be developed in a manner consistent with the principles as set forth in this agreement. The procedures shall be adopted by VICC as soon as practicable, but in no event later than forty-five days after approval of this agreement by the Court.

2. The VICC shall have the following responsibilities:

   a. To develop procedures for implementation of the student transfer and teacher exchange provisions of the settlement agreement;

b. To supervise recruitment, counseling and placement of student transfer and teacher exchanges;

c. To coordinate dissemination of information on available programs to the community;

d. To assist in developing and implementing an effective and safe transportation system for student transfers, including assistance in setting standards for such implementation;

e. To coordinate interdistrict safety and security services where necessary;

f. To prepare an annual budget for its operations for approval by the parties and the Court;

g. To assist in planning and implementing new magnet schools and magnet programs; and

h. To report at least annually to the parties and the Court the steps taken to implement the settlement agreement. This report shall include information including but not limited to: student transfers; teacher exchanges; recruitment counseling and initial placement efforts; student placement and modifications and suspension and expulsion relating to transfer students. The Committee shall provide for:

1. the collection of data providing evidence of compliance and assurance of non-discrimitory treatment, which may include such areas as promotion/retention, extracurricular activities, evaluation and placement.

2. evaluation of implementation process and identification of problem areas to be tar-

geted for special intervention or additional resources. This may include school level data on requests for special education evaluations, disciplinary actions, rates of absence, withdrawal or drop-out.

i. To coordinate the development and dissemination of information about the schools and programs available in each of the school districts which are parties to this settlement agreement;

j. To keep accurate records of all teacher exchanges and status of such exchanges;

k. To receive and address concerns of voluntary exchange teachers relating to their participation in desegregation activities;

l. To assist in staff development and in-service training activities in order to prepare staff to function in integrated settings;

m. To perform such other activities as are necessary and consistent with this agreement.

K. *Student Recruitment and Counseling Center*

1. There shall be established a Student Recruitment and Counseling Center to have responsibility for all recruitment and counseling activities with respect to the student transfers under this settlement agreement. With the approval of the Court, the Student Recruitment and Counseling Center established herein shall include the existing office of the Recruitment and Counseling Center in the City of St. Louis established pursuant to the terms of the St. Louis Public Schools Intradistrict De-

segregation Plan. Nothing herein shall affect the operation of the existing Recruitment and Counseling Center in the City of St. Louis with respect to the Intradistrict Desegregation Plan, and all duties and responsibilities imposed herein shall be deemed additional to those presently performed by that Center. A parallel office of the Student Recruitment and Counseling Center shall be established in St. Louis County by the VICC.

2. The VICC may establish additional and/or satellite offices in the City of St. Louis and St. Louis County as may be necessary and appropriate. All existing satellite offices in the City of St. Louis will continue to operate according to the terms of the Intradistrict Desegregation Plan.

3. The Recruitment and Counseling Center shall with the approval of the VICC hire an adequate staff to perform its duties and responsibilities herein.

4. The Student Recruitment and Counseling Center shall have the following responsibilities:

   a. To process all applications for student transfers in accordance with the principles established by this settlement agreement;

   b. To conduct and coordinate recruitment drives with the school districts which are parties to this settlement agreement;

   c. To conduct and coordinate advertising campaigns relating to the student transfer provisions of this settlement agreement;

   d. To coordinate the development and dissemination of information about the schools and

programs available in each of school districts which are parties to this settlement agreement;

e. To keep accurate records of all student transfers and the status of such transfers;

f. To collect and analyze student data for the VICC annual reports to the parties and the Court required by Section IX.J.2.h.; and

g. To perform such other activities as the VICC may deem appropriate and consistent with the terms of this settlement agreement.

5. The Student Recruitment and Counseling Center shall process all student transfers to part-time specialty programs or full-time programs. It shall not process students participating in part-time educational programs.

L. *Part-Time Educational Programs*

The VICC will coordinate the modification, addition or deletion of any such programs in the future.

M. *Transition*

1. With approval of the Court, the Coordinating Committee established pursuant to Order H(226)81, dated July 2, 1981, shall cease to exist upon the effective date of this settlement agreement.

2. Subject to approval by the VICC, all records, funds, property and personnel of the Coordinating Committee shall be transferred to the VICC on the effective date of this settlement agreement.

3. The VICC and the Coordinating Committee shall cooperate to effect an orderly transition.

4. The effective date of this settlement agreement shall be ten (10) days after the approval of this agreement by the United States District Court for the Eastern District of Missouri.

N. *Resolution of Procedural Disputes in the Administration of the Settlement Agreement*

1. It is expected that most issues which are the responsibility of the VICC will be resolved by a majority vote of a quorum of the VICC.

2. If an issue cannot be resolved by the VICC or a member disagrees with a decision of the VICC, the following steps will apply:

   a. The Chairman will appoint a sub-committee of the VICC to study the issue and report back to the VICC with appropriate recommendations. This sub-committee should consist of three to seven members who represent a fair sample of persons who have a special interest in the issue.

   b. The VICC will then reconsider the issue and vote upon it.

   c. Should this review process not satisfy the parties involved, the issue will then be referred to a mediating panel of three persons. Each party to the dispute will select a member-at-large, and the third member shall be selected by the first two. The decision of this panel will settle the issue on the VICC level.

   d. Direct appeal to the Court will be the final procedure in such matters for all parties.

3. This Section is limited to procedural disputes which may arise in the administration of this settlement

agreement. Nothing contained herein shall limit the parties from its rights under Section XII.

O. *Resolution of Individual Disputes and Grievances of Transfer Students*

The Recruitment and Counseling Center shall provide information and counseling to parents of transfer students and to transfer students who have questions and/or grievances concerning their treatment as transfer students. In any such grievance or dispute other than involving a suspension of more than 10 days or expulsion, if after assistance and counseling have been made available and the applicable procedures of the host district have been completed, the grievance or dispute has not been resolved, the matter shall be referred to the VICC for mediation. VICC will secure the appointment of a mediating panel to conduct non-binding arbitration. Each party to the dispute will select a mediator and the third member will be selected by the first two.

If the dispute still is not resolved, the parties to the dispute may pursue such other legal remedies as are available including judicial enforcement of this settlement agreement, if appropriate.

Where a long-term suspension or expulsion is involved, a transfer student shall have the same rights as a resident student.

X. *Finance*

A. The fulfillment of the obligations of the parties is contingent upon an Order by the Court which establishes adequate funding for the obligations of the parties, con-

sistent with the Agreement in Principle and this Settlement Agreement.

B. The payments for funding under this Agreement shall be as follows:

1. Each year each district shall calculate and certify separately its cost per pupil in a regular school and in a magnet school. The cost per pupil shall be all costs for instruction and support services as reported in the Annual Secretary of the Board Report (FD-5) minus all pupil transportation and food service costs. The State shall pay these costs for full-time equivalent transfer pupils to the districts membership. The State shall pay separately to the host district the then current cost per pupil less the amount of State aid and trust fund allocation per pupil. However, each host district shall report each transfer pupil as a resident pupil for the purposes of determining all forms of State aid and as part of each host district's eligible pupil count for the purpose of determining trust fund allocations.

   Each host district shall estimate the full-time equivalent of transfer pupils to the district's membership and transmit such estimate to the State in September of each year. A correction will be made in January of each year and a final adjustment made in June. Payments shall be made by the State through forward funding paid monthly to each district based upon the September estimate as corrected.

2. No later than 30 days after the entry of the funding order, each school district participating in the

Agreement shall irrevocably elect and notify the State of its election of one of the following options:

a. Each home district shall receive from the State for each student who voluntarily transfers from his or her district to a host district under this agreement one-half of the State aid it would have received had the student remained in his/her home district. This State payment shall be made for each district for a period of five years or any extension of time agreed to by the parties subsequent to the Court's approval of this agreement.

b. Beginning with the 1984-85 school year each district which sends more transfer pupils than it receives under this agreement and which thereby experiences a decline in its actual enrollment shall report its second preceding school year's actual enrollment for purposes of determining State aid and as part of each such district's eligible pupil count for purposes of determining trust fund allocations.

3. The cost of the incentives for provisions for voluntary teacher exchanges under Section VI (Faculty), the cost of student recruitment, start-up costs and building modification costs of new magnet schools and expanded magnet costs to schools programs, one-time extraordinary costs (other than hiring of personnel) such as the costs associated with reopening a closed school, the costs of community involvement centers and part-time educational programs, transportation of transferring pupils, the operating expense of the VICC,

its staff and the Recruitment and Counseling Center and each of its offices, the costs relating to the improvements in educational programs offered by the City Board in Section IV (Quality Education) and such other costs incurred pursuant to this Settlement Agreement shall be paid by such combination of additional State funding pursuant to Court of Appeals for the Eighth Circuit's decision in *Liddell et al v Board of Education et al.*, 677 F.2d 626, 641-642 (8th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3258 (Oct. 5, 1982) (No. 81-2022) and a tax rate increase in the City of St. Louis as shall be ordered by the Court. These payments shall be in addition to the payments set forth in paragraphs a and b above.

4. If any school district obtains desegregation assistance from an outside source, the amount of such funding shall be deducted from the State's funding requirements under this Settlement Agreement. In calculating State payments under subsection a hereof, the State shall determine how much money would have been paid in State aid to the home districts from the State Foundation Funds had the transfer pupils remained in their home districts. That sum shall be applied to the costs of this plan for the purposes set forth in paragraphs 1 and 2 hereof and shall continue to be charged to the Foundation Funds. However, all other costs and payments required under this plan shall not be funded from the Foundation Funds. The State shall not decrease its level of funding for education below the amount of funding established for the 1982-83 fiscal year. Pupils

who are accepted in a host district shall not be required to pay any fee to the host district as an out-of-the district pupil.

5. Each district shall prepare a budget setting forth the estimated costs which it will incur as a result of this Settlement Agreement and present said budget to the Court for approval and appropriate funding orders at a date to be determined by the Court.

XI. *Other Provisions*

A. The City Board shall be invited to join the Cooperating School Districts for the St. Louis Suburban Area, Inc.

B. The Liddell, Caldwell and City Board Plaintiffs are entitled to "reasonable" attorneys' fees and costs of litigation to be paid exclusively by the State after a full hearing on attorneys' fees.

C. Participation in this settlement agreement by any school district shall not be deemed an admission of liability nor an element of proof of liability in any interdistrict school desegregation case.

D. The parties acknowledge that this settlement agreement may be inconsistent with the May 21, 1980 Order as amended and if so, the terms of the May 21, 1980 Order as amended shall be modified, with the approval of the Court, to be consistent with this settlement agreement.

E. Consistent with the Agreement in Principle, there shall be no court ordered mandatory, interdistrict transfers of white or black students until after a hearing on liability as provided in Section XII; the 23 suburban

school districts in St. Louis County will continue to exist as provided in Section XII; the cost of the settlement shall be paid by such combination of State funding and a tax rate increase in the City of St. Louis as shall be provided by the Court as provided in Section X; and black students in suburban school districts that have a minority enrollment of 50% or greater enjoy transfer rights as provided in Sections II and III.

F. The parties recognize that some school districts view the neighborhood school concept as a desirable educational tool. Under this paragraph no district will be required to adopt or abandon a neighborhood school plan and its customary attendance areas. Districts presently operating under a plan established by court order or agreement with any federal agency which addresses the elimination of racially identifiable schools shall not be affected by this paragraph so long as the court order or agreement remains in effect or the district continues to follow the court order or plan.

1. Districts which have exceeded the plan goal (25% black) for the district, but have within the district individual schools with student ratios of more than 50% black shall permit the black students attending those schools the same interdistrict transfer rights as are conferred upon black students attending majority black districts.

2. Districts which are at the plan goal (25% black) or below which have within the district schools with student ratios or more than 50% black shall extend to black students attending those schools the right to transfer intradistrict to another school whose black/white ratio does not exceed 25% black—75% white.

XII. *Stay*

A. The litigation involving paragraph 12(c) and the plaintiffs' interdistrict claims will be stayed for a period of 5 years to permit full implementation of the provisions of this settlement, including voluntary transfers, magnet schools, quality education, and affirmative action under terms set forth below.

B. The stay will not preclude judicial enforcement of the terms of the settlement agreement.

C. In July of each year, beginning July 1, 1984, each of the school districts that is a party to this settlement agreement shall submit to the parties and to the VICC an annual report describing the racial composition of the faculty and student body in that district, and the steps taken to implement the settlement agreement. Any district which has not met its annual target may include in the report factual observations and conclusions addressed to that issue. In addition, each of the other parties to this agreement shall submit to the parties and to the VICC an annual report describing their activities under this agreement, according to the same schedule.

D. When a district reaches its plan ratio within five years or any extension of time mutually agreed to by the parties, it is entitled to a final judgment declaring that it has satisfied its interdistrict pupil desegregation obligations. A district shall also be entitled to a final judgment if within five years it has enrolled 90% of the additional black students required to satisfy its plan ratio calculated pursuant to Section II.A.3. so long as the total number of additional black students attending schools in districts with plan ratios (all districts listed in Section II.A.2.b.) equals or exceeds the number of such black students who would have attended such schools had all

such districts met such plan ratio. In making this latter calculation, resident students in excess of the plan goal shall not be included and interdistrict transfer students in excess of the plan goal shall be included.[1] The plain-

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1. Assume districts X, Y, and Z each have a current enrollment of 100 students of whom none are black. If no black students move into these districts, each will have to accept 18 transfer students (18 is approximately 15% of 118). Assume, however, that in five years, while District X still has no residential black students, District Y has five residential black students (total enrollment 105), and District Z has 18 residential black students (total enrollment 118).

There are two ways for these districts to satisfy the plan ratio:

A. Each district must have accepted enough black transfers to bring its minority enrollment to 15%. Thus, District X must have accepted 18 black transfer students, District Y must have accepted 13 black transfer students and District Z need not accept any. In other words, the three districts together must have accepted 31 interdistrict transfer students.

B. Assume District X has accepted only 16 interdistrict transfer students (i.e. 90% of the plan ratio of 18). It will, nevertheless, have satisfied its obligation if, for example, District Y has accepted 15 students.

To illustrate:

Dist.	White Enrollment	Residential Black Enrollment	Transfer Black Enrollment	Total
X	100	0	16	116
Y	100	5	15	120
Z	100	18	0	118
		23	31	154[sic]

In the alternative, District X will have satisfied its obligations if District Y accepts 13 transfer students and District Z accepts two students.

To illustrate:

Dist.	White Enrollment	Residential Black Enrollment	Transfer Black Enrollment	Total
X	100	0	16	116
Y	100	5	13	120
Z	100	18	2	118
		23	31	154[sic]

tiffs shall not seek any further interdistrict pupil desegregation relief through litigation.

The school district's only continuing interdistrict obligations under the settlement agreement that are judicially enforceable are to cooperate in the recruitment and promotion of transfers under Sections 4a, c, f and h of the agreement in principle as implemented by Sections II and IX hereof, to accept transfer students under Section 1 of the agreement in principle as implemented by Section II hereof, and to participate in the magnet program established under Section 2 of the agreement in principle as implemented by Section III hereof in order to reach and maintain the plan goal (25 percent). The Court will relinquish active supervision two years after the five-year period.

E. If a school district does not meet within five years its plan ratio or the numerical requirements as set forth in paragraph D above, then

1. Following completion of the monitoring and negotiation process described in paragraphs F and G below, plaintiffs may renew the litigation involving paragraph 12(c) and their pending interdistrict claims as to any such school district.

2. In such litigation, plaintiffs must establish liability and they shall not seek school district consolidation, dissolution or reorganization and they further shall not seek a remedy beyond the plan goal (25 percent).

3. Any remedy shall distribute the burdens of desegregation equitably between the minority and the nonminority students in the school districts involved in the litigation under this paragraph.

4. In devising any remedy the Court will consider the monitor's report. The monitor's report shall not be conclusively binding but shall be entitled to weight.

F. *The Monitor*

1. By October 1, 1987, the plaintiffs and the school districts that have not yet satisfied the numerical requirements of paragraph D or the district's plan ratio above will meet and attempt to agree on the selection of a monitor. If they are unable to do so, each side will select its own monitor and the two monitors will then select a third. The third monitor shall be a person who has not been involved in any aspect of this litigation and has not taken a public position on any aspect of the case.

2. The Monitor shall make an investigation and positive recommendation. The Monitor shall by January 31, 1988 conduct an informal fact finding hearing at which all interested persons shall have an opportunity to be heard.

3. By April 1, 1988 the Monitor shall file a final report. The Monitor's review shall be limited to:

A. Determine the steps taken by the district to meet its plan ratio;

B. Investigate what further steps can be taken to assist the district to meet its plan ratio;

C. Make recommendations as to steps to be taken by the parties to assist the district in meeting its plan ratio and the time period which the Monitor believes is necessary for the district to reach its plan ratio. These recommendations shall be consistent with the obligations of the parties contained in Sections II and III of this agreement.

4. The Monitor shall file his report with the Court. If the district and the plaintiffs agree to follow the recommendations of the Monitor, then those recommendations shall be put in place and the stay extended for the period of time contained in the recommendations.

5. If the district or any plaintiff does not accept the recommendations of the Monitor, the plaintiffs or any of them may proceed to renew the litigation.

6. If plaintiffs fail to renew the litigation within a period of two years from the date of the filing of the Monitor's report, they shall be barred from renewing the litigation unless an extension is mutually agreed to by the district and the plaintiffs.

G. *Negotiations*

Following the issuance of the monitor(s)' report on April 1, 1988, the parties may meet and attempt to agree upon a course of action for each district which course of action may be at variance with the Monitor's recommendations.

(3)

Supreme Court, U.S.
FILED
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No. 87-2040

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
ROCKWOOD SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *ET AL.* AND RESPONDENTS EARLINE CALDWELL, *ET AL.*

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QUESTION PRESENTED

Whether a court order pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977), requiring State officials to help fund desegregation remedies as part of a series of orders requiring State officials to help remedy the vestiges of *de jure* school segregation which State officials helped to cause, presents an issue warranting review, particularly where the Court of Appeals has previously rejected State officials' objections to such orders and this Court has previously denied certiorari.

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BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *ET AL.* AND RESPONDENTS EARLINE CALDWELL, *ET AL.*

Petitioners State of Missouri and certain State officers (hereinafter "Petitioners" or "State defendants") have asked this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 4, 1988, in *In re: Liddell v. Board of Education of City of St. Louis*, 839 F.2d 400. On four previous occasions, this Court has denied requests to review earlier decisions in this case raising issues similar to those raised again by the State defendants here. Because the decision below is correct and does not raise any questions warranting review by this Court, respondents Board of Education of the City of St. Louis, Missouri, its members, officers, and administrators (hereinafter "City Board") and

respondents Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People (hereinafter "Caldwell respondents") urge this Court to deny the State defendants' petition.

STATEMENT OF THE CASE

Notwithstanding the State defendants' efforts to separate the instant petition from the remainder of this case, the decision below is part of a continuing effort since 1980 to remedy school segregation in St. Louis and to require the State defendants to comply with constitutional standards. As discussed below, both this Court and the courts below have consistently rejected the efforts of the State defendants to resist the court orders requiring them to help remedy the school segregation they helped to cause in St. Louis.

Previous St. Louis desegregation orders and attempts to obtain Supreme Court review

In 1980, after an extensive trial in which the State participated, the Eighth Circuit held that the State and the City Board had failed to discharge their constitutional duty to eliminate the vestiges of the *de jure* racially dual school system in the City of St. Louis. The court found that, as a consequence of these constitutional violations, 77% of the city schools remained more than 90% one-race. *Adams v. United States*, 620 F.2d 1277, 1285 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980).

The Court of Appeals recognized that any feasible remedy limited to mandatory reassignment of students within the St. Louis city district could not effectively desegregate the city schools and remove the vestiges of the dual system, and that under any practical alternative, some

black St. Louis students would remain in one-race schools. *Id.* at 1296. The appellate court thus directed the trial judge to consider the use of other remedial techniques, including the implementation of compensatory and remedial educational programs pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*), and voluntary student exchanges with suburban school districts. *Adams v. United States*, *supra*, 620 F.2d at 1296-97.

On remand, the District Court conducted additional hearings, in which the State fully participated, and ordered the implementation of an initial desegregation plan for 1980-81. The District Court also ordered the State defendants and the City Board to develop and submit additional desegregation proposals, such as a plan for voluntary student exchanges between the city school district and the surrounding St. Louis county school districts. *Liddell v. Board of Education*, 491 F. Supp. 351, 353 (E.D. Mo. 1980) (paragraph 12(a)), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981). Among its other findings, the District Court specifically held that the State was a "primary constitutional wrongdoer" with respect to the "segregated conditions in the St. Louis public schools," and ordered that the State defendants and the City Board pay the cost of desegregation remedies. *Id.* at 359-360. The State defendants appealed, protesting the order that they help pay the costs of desegregation remedies. The Eighth Circuit affirmed the District Court's order in all respects, and this Court denied certiorari. 454 U.S. 1081 (1981).

The District Court proceeded to order further implementation of the relief it outlined in 1980 in order to continue the process of eliminating the vestiges of school segregation in St. Louis. This included an order that the state defendants pay transportation and related costs of a voluntary interdistrict transfer plan that had been developed pursuant to paragraph 12(a) of the 1980 order, under which black city students and white county

students from districts who chose to take part could participate in voluntary interdistrict transfers. The State defendants appealed. As in 1981, the Eighth Circuit rejected the State defendants' arguments and affirmed the District Court, noting that "30,000 black students still attend[ed] all-black schools" in St. Louis. 677 F.2d at 628. As in 1981, this Court denied certiorari. 459 U.S. 877 (1982).

In 1981, the Caldwell respondents and the City Board filed motions to add suburban districts to the litigation and to bring claims for interdistrict remedies. These claims contended that the suburban districts, in conjunction with the State, had created and perpetuated a racially dual, metropolitan-wide structure of public education justifying the implementation of a mandatory metropolitan desegregation remedy. Shortly before trial of the interdistrict claims in 1983 ,a settlement agreement was reached with all 23 St. Louis County suburban districts. Based on the settlement agreement, and on extensive hearings in which the State defendant fully participated, the District Court entered a comprehensive desegregation order in July, 1983, containing desegregation measures that build upon the Paragraph 12(a) voluntary plan and the 1980 desegregation order. *Liddell v. Board of Education*, 567 F. Supp. 1037 (E.D. Mo. 1983), *modified and aff'd*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984).

The 1983 settlement agreement and order were designed to give black students attending one-race schools in the city a choice between transferring to predominantly white schools in suburban districts or attending schools in the city in which the vestiges of segregation would be removed to the maximum extent practicable. Like the paragraph 12(a) plan, the 1983 plan provides for voluntary interdistrict transfers between city and suburban district schools. To attract suburban students to the city, and to provide additional relief for black city

students, the plan also includes magnet schools, remedial and enrichment programs in city schools, part-time integrative programs, teacher exchanges between the city and the suburb, and special educational improvements for black city students remaining in one-race schools. The costs of the plan were to be paid for by the City Board and the State defendants, based on their established liability for segregation in the St. Louis city schools. The State again protested that it should not be required to participate in and help fund desegregation as ordered by the District Court. The Court of Appeals affirmed the District Court's order with modifications, and this Court again denied certiorari. 469 U.S. 816 (1984).

In the present petition, the State defendants claim that no substantive relief has been ordered against them, and that they have been required only to help pay the costs of desegregation in St. Louis. In fact, however, the District Court's orders impose significant substantive desegregation obligations on the State defendants in addition to requiring them to help fund desegregation remedies. For example, the 1983 order and settlement plan required the State defendants to provide transportation services to students taking part in interdistrict transfers or part-time integrative programs, to participate in the administration of the interdistrict transfer program through the voluntary Interdistrict Coordinating Council created by the plan, and to participate in the planning, administration, and evaluation of magnet programs through the plan's Magnet Review Committee.[1] The

[1] *See Liddell v. Board of Education, supra*, 567 F. Supp. at 1055 (ordering State defendants to comply with applicable provisions of Settlement Plan); Settlement Agreement, Sections III-C, III-D, VIII, IX-A, IX-B, reprinted in the appendix ("App.") to the Petition for a Writ of Certiorari ("Pet.") at A-168-170, A-206-208 (describing specific State functions under Settlement Plan). *Accord, e.g., Liddell v. Board of Education, supra*, 731 F.2d at 1323 (explaining responsibility of State and other representatives on Coordinating Council to "coordinate and administer the student

courts below repeatedly have urged the State defendants to take part in the desegregation plan "on a cooperative rather than an adversary basis." *Liddell v. Board of Education, supra*, 677 F.2d at 628. As the Court of Appeals recently noted with respect to magnet schools, however, even though the State defendants have "an obligation to work together" with the City Board and other parties in "planning and operating" desegregation remedies, the State defendants have "mainly reacted to the City Board's proposals, usually negatively." *Liddell v. Board of Education, supra*, 801 F.2d at 282.

Despite such obstacles, progress has been made since 1983. For example, as of 1987-88, almost twelve thousand black students from the City attend schools voluntarily in the suburbs pursuant to the interdistrict transfer program. *See* App. at A-5. Even this figure, however, is thousands of students short of the number of interdistrict transfers sought to be achieved by the 1983 order, with the result that more than 19,000 black city students still remain in one-race schools. *Id.*; Desegregation Monitoring and Advisory Committee Report L(1718)87 (Dec. 17, 1987) at 5. The City Board and the Caldwell respondents continue to seek to eliminate the remaining vestiges of segregation in St. Louis, and continue to urge the State defendants to cooperate in doing so.

The State defendants' current attempt to obtain Supreme Court review

This petiiton concerns a decision by the court below requiring the State to further desegregation in St. Louis by paying certain costs incurred by suburban districts in accommodating voluntary transfer students from the City

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transfers, the voluntary teacher exchanges and the part-time educational programs"); *Liddell v. Board of Education*, 801 F.2d 278, 282 (8th Cir. 1986) (noting that "representatives of the State must be involved in the planning process for curriculum, facilities, and transportation, and in the recruitment process" for magnet schools).

pursuant to the 1983 desegregation plan. This order was based on Section X.B.3. of the 1983 settlement agreement, which was approved on appeal and specifically provides for reimbursement of a suburban district's "one-time extraordinary costs (other than hiring of personnel) such as the costs associated with reopening a closed school" in connection with the interdistrict transfer plan. *See* App. A-5, A-220.

Pursuant to this provision, the Court of Appeals ruled that the State should be ordered to pay for some of the costs of reopening a closed elementary school in one suburban district and to help pay the costs of building more classroom space to accommodate interdistrict transfer students in another district. App. at A-5. The court explained that it was approving State payment only for "these non-recurring costs incurred as a result of the presence of the transfer students," and only "to the extent existing and newly transferred students cause the need for new space." App. at A-16, A-13. The Court of Appeals issued its decision on February 4, 1988, and denied the State defendants' petitions for rehearing and for rehearing *en banc* on March 14, 1988. The State's current petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

1. The State defendants claim that the order below, and presumably all court orders since 1980 which have required the State defendants to help bear the costs of desegregation in St. Louis, violate the Eleventh Amendment. In fact, however, this Court has already ruled in *Milliken II* that the Eleventh Amendment permits the federal courts to order that State officials help pay the costs of remedying segregation for which they are partially responsible.

In *Milliken II*, as in this case, State officials were found responsible for constitutional violations which contributed to segregation in city schools. *Milliken II*, 433 U.S. at

269. In *Milliken II*, as in this case, the District Court ordered implementation of remedies in addition to mandatory student assignment to help eliminate the vestiges of segregation, and ordered State officials found liable for helping cause segregation to help pay for the costs of such remedies. *Id.* at 273-277. Both the Court of Appeals and this Court affirmed. In its opinion in *Milliken II*, moreover, this Court specifically rejected the State officials' assertion that "the requirement that the state defendants pay" part of the costs of desegregation remedies "violates the Eleventh Amendment." *Id.* at 288.

As this Court explained in *Milliken II*, a decree requiring State defendants found responsible for helping cause segregation to help pay desegregation-related costs "fits squarely within the prospective-compliance exception" to the Eleventh Amendment. *Id.* at 289. That exception, the Court held, authorizes the federal courts to require State officials to help "eliminate from the public schools all vestiges of state-imposed segregation" by supporting desegregation-related remedies, "notwithstanding a direct and substantial impact on the State treasury." *Id.* at 289, 290. Based on *Milliken II*, the court below has twice rejected the State defendants' claims that orders requiring them to help fund desegregation remedies in this case somehow violate the Eleventh Amendment. *See* App. at A-11; *Liddell, supra*, 731 F.2d at 1308 n.13 (reprinted at App. at A-71 n.13).

The State defendants have failed to offer any basis for reconsidering their rejected Eleventh Amendment claims. The State appears to suggest that *Milliken II* is distinguishable because State officials in that case were ordered to participate in implementing desegregation remedies, and the payment of funds was merely "ancillary" to those obligations. Pet. at 14. In fact, however, the precise issue presented in *Milliken II* was whether the Eleventh Amendment permits a federal court to "re-

quire state officials found responsible for constitutional violations to bear part of the costs" of remedying them, and it was clear that the State's "basic complaint concern[ed] *money*," not other issues. *Milliken II*, 433 U.S. at 269; *id.* at 293 (Powell, J., concurring). In any event, it is clear that the District Court in this case has ordered the State to participate extensively in implementing desegregation remedies, in addition to bearing part of the costs, so that the State's attempt to distinguish *Milliken II* is unavailing. *See supra* pp. 5-6. The decision below is clearly consistent with *Milliken II*, and does not warrant review by this Court.

2. Contrary to the State defendants' claims, moreover, there is no conflict among the circuits justifying review by this Court. The federal courts which have considered the issue have consistently ruled that State officials who have contributed to school segregation can be ordered to help fund desegregation remedies. These decisions include rulings in the Sixth Circuit, in which, contrary to the State defendants' assertions, this principle has also been recognized. *See, e.g., Little Rock School District v. Pulaski County Special School District*, 839 F.2d 1296, 1307 (8th Cir. 1988); *United States v. Board of School Commissioners*, 677 F.2d 1185, 1186-87 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982); *Penick v. Columbus Board of Education*, 519 F. Supp. 925, 942 (S.D. Ohio), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Evans v. Buchanan*, 447 F. Supp. 982, 1038 (D. Del.), *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

No conflict warranting review is presented by the decision in the Nashville case, as to which this Court has recently denied certiorari. *See Kelley v. Metropolitan County Bd. of Ed.*, 836 F.2d 986 (6th Cir.), *cert. denied*, 108 S. Ct. 2848 (1988). In *Kelley*, a desegregation suit

originally filed in 1955, the Nashville school district filed a third-party complaint against the State of Tennessee in 1981, asking that the State be required to pay the full cost of desegregation remedies that had been ordered and implemented beginning in 1971. *Kelley, supra*, 836 F.2d at 987. Unlike this case, the State in *Kelley* had not previously been a party to the suit, and thus did not participate in the court proceedings that determined the nature, scope, and cost of the remedy. In addition, the Sixth Circuit in *Kelley* found insufficient evidence to hold that the State was a constitutional violator with respect to any remaining vestiges of segregation in Nashville, and ruled that the plaintiffs were already receiving "the full measure of relief to which they are entitled under the Constitution" without any relief from the State. *Id.* at 989-90. Indeed, none of the plaintiffs in Nashville had ever asserted a claim against the State. *Id.*

In contrast, the State has been a party to this case during the relevant liability and remedy proceedings. The claims against it have not sought to require the State defendants to pay retroactively for previous desegregation remedies years after the plaintiffs' efforts to secure them; instead, these claims have been part of plaintiffs' efforts, joined by the City Board since 1980, to obtain desegregation remedies in the first place and to implement them. In addition, the State in this case *has* been found to be a constitutional violator, and it is precisely on that basis that the courts below have ordered relief against the State defendants. Unlike *Kelley*, the orders in this case are based on the State's constitutional violations and are "part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system," as required by *Milliken II*. *Id.*, 433 U.S .at 290. The decision in *Kelley* simply does not

present a conflict with the decision in this case warranting review by this Court.

3. As this Court has recognized, it is usually appropriate to defer to the lower courts with respect to the details of implementation of desegregation remedies because of their familiarity with the "local situations coming before them" and their "proximity to local conditions." *Milliken II*, 433 U.S. at 287, n.18. The State defendants' petition offers no reason for an exception to that practice in this case. The court below ordered the State defendants to pay only certain specified costs which were "due to the presence of transfer students from outside the school district" in two suburban districts, in order to promote additional voluntary interdistrict transfers and more effective desegregation. App. at A-16. The details of the State defendants' specific objections to the particular relief ordered have already been considered by the District Court and the Court of Appeals, and may be further considered upon remand to the District Court. *See* App. at A-17. Objections to such relief on Eleventh Amendment grounds have been rejected twice by the Court of Appeals in this case, on numerous occasions by other courts, and by this Court in *Milliken II*. The State defendants' attempt to resurrect such discredited arguments fails to present an issue warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 87-2040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, *et al.*,

and

RITENOUR SCHOOL DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT RITENOUR SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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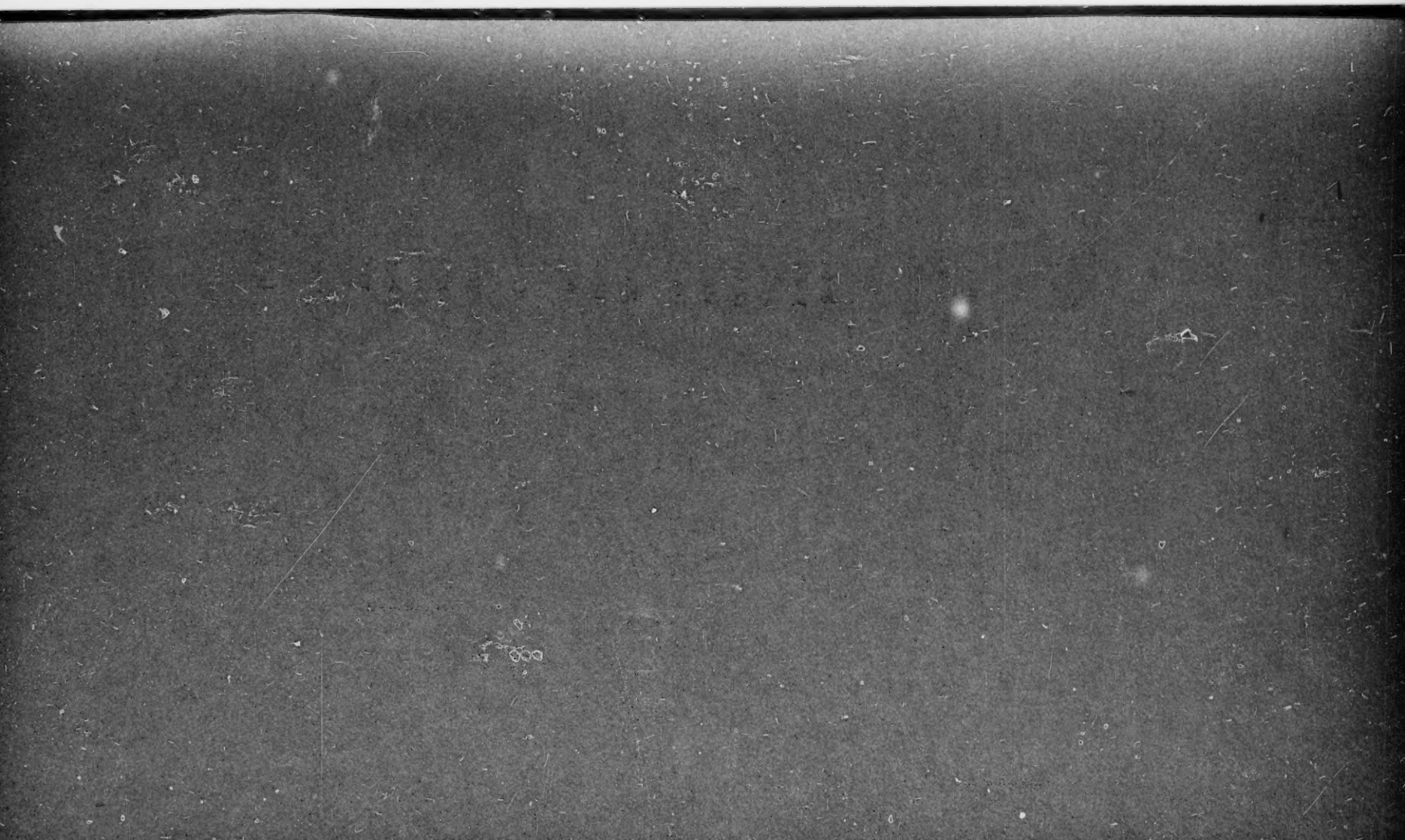

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No. 87-2040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, *et al.*,

and

RITENOUR SCHOOL DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT RITENOUR SCHOOL DISTRICT'S BRIEF IN OPPOSITION

Respondent Ritenour School District respectfully requests this Court to deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case. The opinion is reported at 839 F.2d 400 (1988).

STATEMENT OF THE CASE

This case arises out of the 16-year old St. Louis school desegregation case. For the fourth time, the State of Missouri ("State") has filed a certiorari petition seeking to challenge its funding obligations under the voluntary interdistrict student transfer program. That program, whereby black students from the City of St. Louis ("City") may elect to attend school in the school districts of St. Louis County ("County"), has for years been an important part of the court-ordered remedy designed to desegregate the City's public schools. The State's challenges to its funding obligations under the voluntary transfer program — including its present challenges predicated on the Eleventh Amendment and notions of federalism and state sovereignty — have been repeatedly made to and rejected by the courts below in prior decisions. The rulings upholding the State's duty to fund the transfer program include three prior decisions by the court of appeals, from each of which the State unsuccessfully petitioned this Court for certiorari review. This circumstance alone justifies denial of the State's present petition (Point III, below).

A review of the earlier rulings by the courts below also demonstrates that the latest twist to the State's Eleventh Amendment argument — that the funding order below is a "naked order to pay" bearing no relationship to "any substantive injunctive relief" (Pet. at 7) — is flatly wrong. The State of Missouri, as "the primary constitutional violator" along with the Board of Education of the City of St. Louis ("City Board"), was and remains under a series of substantive decrees directing implementation of the voluntary City-County student transfer program as an essential element of the remedy to eliminate the vestiges of *de jure* racial discrimination in the City's schools. These orders, originally entered in 1980 after findings of liability, specifically directed the State and City Board to "make every feasible effort" to secure the voluntary

cooperation[1] of the St. Louis County school districts in accepting and educating black City students electing to transfer.

The cost-reimbursement payment the State was directed to make to the Ritenour School District in the decision below was a direct and inevitable consequence of the injunctive orders requiring the State to implement the voluntary transfer program as a part of the St. Louis desegregation remedy. The State's suggestion to this Court that this "is *not* a case about desegregation" (Pet. at 1, emphasis in original) is unsupportable. As will be demonstrated, the assertion that "at no time [has the State] been enjoined to do anything except to pay money" (Pet. at 8) is a grievous mischaracterization of the remedial orders entered in this case. The mischaracterization is a belated[2] and invalid attempt by the State to recast the St. Louis school desegregation case into the mold of *Kelley v. Metropolitan Board of Education of Nashville and Davidson County,* 836 F.2d 986 (6th Cir. 1987), *cert. denied,* 108 S.Ct. 2848 (1988), which involved a fundamentally different situation (Point II, below). The State's funding obligation in the case at bar falls squarely within the facts and holding of *Milliken v. Bradley,* 433 U.S. 267 (1977) ("*Milliken II*") (upholding, against Eleventh Amendment challenges, Michigan's obligation to fund part of the Detroit school desegregation remedy) (Point I, below), as the Eighth Circuit has often expressly held in its prior decisions.

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[1] The County school districts, unlike the State and City Board, are not adjudicated constitutional violators. In fact, as discussed in the text below, nearly all of them have been absolved of any liability for interdistrict school desegregation in final judgments entered by the district court.

[2] *Kelley* had been decided but was not yet reported at the time the Eighth Circuit issued its opinion below. The State first advanced its *Kelley*-inspired "naked order to pay" theory in its unsuccessful motions for rehearing and rehearing en banc. This latest version of the State's Eleventh Amendment argument, which is the basis of the State's present petition, is thus not considered or addressed anywhere in the opinion of the court below. For this further reason, this case is not appropriate for certiorari review.

A.

The Remedial Decrees And Prior Decisions In The St. Louis School Desegregation Case

In February, 1972 a group of black parents (the "Liddell" plaintiffs) filed a class action lawsuit in the United States District Court for the Eastern District of Missouri alleging racial segregation in the St. Louis City public schools in violation of the Fourteenth Amendment. The United States, the NAACP (the "Caldwell" plaintiffs), a white citizens' group (the "Adams" plaintiffs) and other parties were eventually thereafter joined as plaintiffs. By 1977, the defendants named in the case included the State of Missouri, the Commissioner of Education of the State of Missouri, the State of Missouri Board of Education, and the Board of Education of the City of St. Louis. The State defendants and City Board denied any unconstitutional segregation in the City school district and denied responsibility to implement any remedy.

The case proceeded to trial on both liability and remedy. The case was tried to the district court in 13 trial weeks during 1977 and 1978. Based on the voluminous record, and reversing the district court (which had found for defendants), the Eighth Circuit held that the State and City Board were jointly responsible for maintaining a segregated school system in the City of St. Louis. *Adams v. United States,* 620 F.2d 1277 (8th Cir.) (*en banc*), *cert. denied,* 449 U.S. 826 (1980). The court found that the Missouri State Constitution had required separate schools for white and black children until 1976, and that the State had not taken prompt and effective steps to desegregate the City schools after *Brown v. Board of Education,* 347 U.S. 483 (1954). The court also held that City Board's policies and practices since 1956 had contributed to the existing segregation. *Adams,* 620 F.2d at 1287-88. The case was remanded to the district court with instructions to "take those steps necessary to bring about an integrated school system." *Adams,* 620 F.2d at

1295. Notably, for our purposes, the Eighth Circuit explicitly remanded to the district court to "develop[e] and implement[] a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County." *Adams,* 620 F.2d at 1296-97. Only the Adams group filed a petition for certiorari in this Court, which was denied.

On remand to the district court, in addition to the existing State defendants (the State, its Commissioner of Education and the State Board of Education), the Governor of Missouri, the Missouri Attorney General and the Missouri State Treasurer were joined as defendants. The district court held on remand as follows:

> [T]he state defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected. . . . Since "[t]he primary responsibility for insuring a constitutional structure of public education is the state's, . . . it is appropriate for the Court to order the state" to affirmatively participate in remedial efforts [citations omitted], including the provision of funding, to the extent necessary, for the desegregation efforts ordered by the Court. *See, e.g., Milliken II, supra;* [other citations omitted].
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> . . . .
>
> . . . The State of Misouri defendants have been found and held liable with the Board of Education of the City of St. Louis for the segregated conditions in the St. Louis public schools. The State should bear an appropriate share of the cost of implementing the Desegregation Plan [citing *Milliken II* and other authorities].

Liddell v. Board of Education, 491 F.Supp 351, 359-60 (E.D. Mo. 1980). The district court further found that the State defendants were

> jointly and severally liable with the defendant Board for the costs pertaining to the Desegregation Plan. The State of Missouri, which prior to 1954 mandated school segregation, never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice, and policy. The State of Missouri is liable for the *de jure* segregation which existed in the St. Louis Public Schools.

Liddell, 491 F.Supp at 357.

Again, notably for our purposes, the district court in paragraph 12 of its decree "Ordered, Adjudged and Decreed that" the State defendants and City Board shall:

> [a] make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis. . . .
>
> . . . .
>
> [c] develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necesary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.[3]

Liddell, 491 F.Supp at 353. The district court at this time also confirmed the Desegregation Plan that had been submitted by the City Board. On September 17, 1980 and again on December 19, 1980, the district court reaffirmed its paragraph 12(a) and

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[3] As will be seen, the Eighth Circuit later clarified paragraph 12(c) to be limited to remedying segregation only in the City of St. Louis, inasmuch as the County school districts had never been found liable for school segregation.

12(c) directives to the State and included some additional and amendatory provisions.[4]

The State (and others) appealed to the Eighth Circuit from the district court's orders entered on remand. The State challenged its court-ordered funding obligations and specifically challenged the transfer program provisions of paragraphs 12(a) and 12(c). As to funding, the Eighth Circuit upheld the State's duty to pay based on the "causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system." *Liddell v. Board of Education,* 667 F.2d 643, 654 (8th Cir. 1981) ("*Liddell II*"). Furthermore, the Eighth Circuit observed, the State's funding obligation was specifically decided in *Adams v. United States,* 620 F.2d 1288 (8th Cir. 1980), and "the State has chosen not to seek review of that decision in the Supreme Court." *Liddell II,* 667 F.2d at 654.

With regard to the State's challenges to paragraph 12, the Eighth Circuit stated:

> . . . We take this opportunity to stress the legal obligation of the State of Missouri . . . to develop and implement the plans contemplated by paragraph 12. . . .
>
> . . . .
>
> . . . Paragraphs 12(a)-(c) of the district court's order are salutary remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.

Liddell II, 667 F.2d at 651 n. 6 & 659. As to 12(a), the Eighth Circuit held that "the voluntary exchanges contemplated by section (a) must be viewed as a valid part of the attempt to fashion

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[4] These revised versions of 12(a) and 12(c) are set out at *Liddell v. Board of Education,* 667 F.2d 643, 657-58 (8th Cir. 1981).

a workable remedy within the City." *Id.* at 651. "Section (c) of paragraph 12," the court further held, "is also within the authority of the district court." *Id.* The Eighth Circuit clarified 12(c), however, by noting that the requirement "to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County" must be limited to the City of St. Louis, and is enforceable only against the State and City Board:

> We must read the term "government-imposed" to mean "found to be government-imposed by a court." Therefore, to the extent that the segregation was imposed by County school districts which are not parties to the lawsuit and which have not been designated as constitutional violators, it cannot be considered to be "government-imposed." But, to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so.

Liddell II, 667 F.2d at 651.

On June 17, 1981 the State filed its first certiorari petition in this Court. The petition sought review of both the Eight Circuit's 1980 decision in *Adams* and its 1981 decision in *Liddell II.* The petition (No. 80-2152) included in its list of "Questions Presented" the question whether the State had been properly ordered "to bear the cost of and participate in a plan of voluntary pupil exchanges with non-party school districts?" The petition specifically challenged the State's funding obligations under paragraphs 12(a) and (c) of the district court's order. The State argued, as it does again in the instant petition, that the "order that the State of Missouri fund and participate in a voluntary interdistrict transfer plan would involve a major change in State operations" and is an impermissible attempt "to restructure the operation of both local and state governmental

entities" (Pet. No. 80-2152 at p. 23). This Court denied certiorari on November 30, 1981. 451 U.S. 902.

On July 2, 1981 the district court entered an order authorizing voluntary interdistrict transfers and requiring the State to pay the full cost of these transfers pursuant to paragraph 12(a) of the 1980 Order.[5] The court found that the proposed 12(a) plan was "fair and reasonable" and "conducive to obtaining a proper level of constitutional compliance" and would "aid in eliminating the remaining vestiges of school segregation." Order H(226)81, p. 38. The district court specifically found that the plan met the equitable principles required by this Court in *Milliken II* in that (1) the remedy was related to the condition alleged to offend the constitution, (2) the decree was remedial, i.e., it would tend to restore victims to the position they would have been in absent the constitutional violation, and (3) the remedy properly took into account the interests of the State and local authorities in managing their own affairs. *Milliken II,* 433 U.S. at 280-81.

The State appealed to the Eighth Circuit, arguing that "it cannot be required to pay the costs of implementing a 12(a) plan for voluntary pupil transfers between the city schools and those of St. Louis County." *Liddell v. Board of Education,* 677 F.2d 626, 629 (8th Cir. 1982) ("*Liddell V*"). The Eighth Circuit rejected the contention:

> Paragraph 12(a) was designed to help remedy the proven unconstitutional segregation of the city schools as part of and in conjunction with the overall desegregation plan which we approved in *Liddell II.*
>
> . . . .

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[5] The costs of numerous other remedial duties were allocated one-half to the State and one-half to City Board.

> Paragraph 12(a) is entirely enforceable against the state defendants; they are primary constitutional wrongdoers, and, therefore, can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district. *Hills v. Gautreaux,* 425 U.S. 284 (1976).

Liddell V, 677 F.2d at 629-30 n. 4 & 630. The Eighth Circuit further stated that the State's liability to fund the 12(a) transfers was "settled" and not subject to relitigation:

> We held in *Adams* that the state had substantially contributed to the segregation of the public schools of the City of St. Louis. No appeal was taken from that decision by the state. That decision has been settled and will not be reopened. *See generally United States v. United States Smelting, Refining and Mining co.,* 339 U.S. 186, 198 (1959); 1 B. Moore's Federal Practice ¶ 0.404, p. 401-405 (1980). In addition, we specifically sustained the validity of paragraph 12(a) of the district court's order of May 21, 1980, in our February 13, 1981, decision [*Liddell II*]. The Supreme Court denied certiorari review of that decision on November 30, 1981.

Liddell V, 677 F.2d at 629-30. The Eighth Circuit noted that the State had specifically challenged paragraph 12(a) in its certiorari petition. *Liddell V,* 677 F.2d at 630 n. 5.

Liddell V also reiterated the State's and City Board's obligation to prepare and implement a broader interdistrict desegregation plan as required by paragraph 12(c):

> Paragraph 12(c) permitted the district court to require the defendants who have been adjudged to be constitutional wrongdoers — the State defendants and the City Board — to prepare and submit feasibility plans for interdistrict desegregation involving city and suburban schools in a way that will provide complete and lasting school desegregation.

. . . .

> It is [clear] that the district court can require existing defendants — the state and city school board — to take the actions which will help eradicate the remaining vestiges of the government-imposed school segregation in the city schools, including actions which may involve the voluntary participation of the suburban schools. For example, the district court could . . . require the state to provide additional incentives for voluntary interdistrict transfer. Such relief would not materially affect parties that have not been found constitutionally liable and, hence, would be permissible under paragraph 12(c).
>
> . . . .
>
> To the extent that suburban schools are willing to cooperate, the plans requiring their participation can now go forward.

Liddell V, 677 F.2d at 641-42.

On April 30, 1982 the State filed a petition for certiorari with this Court seeking review of *Liddell V*. The petition (No. 81-2022) suggested in its first "Question Presented" that the interdistrict transfer program impermissibly "would restructure the operation of a state governmental entity." The State reiterated its attack on the district court's 1980 decree "ordering the state to participate in an inter-district remedy" (Pet. No. 81-2022 at p. 10). The State argued that the paragraph 12 funding orders were invalid because they required the State defendants "to substantially alter their governmental structures" (*id.* at p. 12). The State also complained about this Court's prior denial of certiorari (*id.* at pp. 26-27). This Court denied the State's petition on October 4, 1982. 459 U.S. 877.

On March 30, 1983 a proposed agreement with the St. Louis County school districts was submitted to the district court. *See* Pet. Appx. G., "Settlement Agreement," A135 *et. seq.* The

Settlement Agreement was the product of extensive negotiations involving the plaintiffs, City Board, the State of Missouri[6] and all of the 23 school districts in St. Louis County. It was expressly submitted in response to and under the authority of paragraphs 12(a) and 12(c) of the district court's 1980 Order (Pet. Appx. A137, "Purpose") which, as clarified by the Eighth Circuit, required the State and City Board to make "every feasible effort" to secure the cooperation of the County school districts and to implement a program of voluntary City-County student transfers. The Settlement Agreement also served as a settlement of the plaintiffs' recently filed class action claims against the County school district alleging unconstitutional interdistrict school segregation.

Under the terms of the Settlement Agreement, the County school districts agreed to accept and educate black City students voluntarily electing to transfer (*see* Pet. Appx. A138-9 & A146 *et seq.*). Their agreement to do so, however, was contingent upon receiving full reimbursement of their costs, as set forth in Section X, "Finances" (Pet. Appx. A218 *et seq.*). The County districts anticipated that the influx of transfer students would eventually require the reopening of previously closed schools and the construction of additional classroom space in the County. They accordingly insisted upon a provision entitling them to reimbursement of their "one-time extraordinary costs . . . such as costs associated with reopening a closed school" (Pet. Appx. §X.B.3., A220). The Settlement Agreement further provided that litigation of plaintiffs' interdistrict claims would be stayed for five years (or more) and that each County district accepting enough transfer students to reach a pre-set goal would receive a final judgment declaring the district had satisfied its desegregation obligations.

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[6] Although a substantial participant in the negotiations, the State, for reasons of its own, declined to sign the final Settlement Agreement.

The district court, after extensive hearings, approved the Settlement Agreement. The State was ordered to fund 100% of the voluntary transfer program and certain other programs. The State and City Board were ordered to fund equally (50-50) the quality education and capital improvements programs for the City's schools. City Board was ordered to bear certain other costs.

The State appealed, challenging *inter alia* its funding obligations for the transfer program. The Eighth Circuit rejected the arguments for two reasons:

> First, the issue has previously been decided adversely to the State; second, the interdistrict transfers are intrinsic to an effective remedy for the intradistrict violation and are justifed by precedent.

Liddell v. State of Missouri, 731 F.2d 1294, 1302 (8th Cir.) (*Liddell VII*), *cert. denied,* 469 U.S. 816 (1984). As to the former, the opinion observes that "this Court has repeatedly authorized the interdistrict transfer of students as a fundamental element of an effective remedy for the unconstitutional segregation of the city schools." *Id.* at 1302. Retracing at length its prior decisions in *Adams* and the various *Liddell* cases, as well as the same arguments repeated in the State's two prior certiorari petitions, the Eighth Circuit concluded:

> As a result of our previous holdings and of the Supreme Court's inaction, the use of interdistrict transfers is settled as law of the case. . . . In this case, our conclusion that state-funded interdistrict transfers are an appropriate remedy is strengthened by our previous invocation of the law of the case doctrine. *Liddell V, supra,* 677 F.2d at 629-30.

Liddell VII, 731 F.2d at 1304-05.

"Notwithstanding our view that the issues regarding interdistrict transfers have been heretofore decided," the *Liddell VII*

opinion continues, "we again reach the merits of the matter." 731 F.2d at 1305. The opinion then proceeds to analyze at length the requirements of *Milliken II,* including those pertaining to compliance with the Eleventh Amendment, and determines that they are fully satisfied with respect to State funding of the City-County transfer program. 731 F.2d at 1305-08.

Liddell VII specifically addressed and rejected the argument, advanced again by the State in the instant petition, that the funding order forces a "restructuring" of state government and "will compel other budget cuts, which would interfere with the autonomy of state and local governments." 731 F.2d at 1308. The Eighth Circuit reasoned:

> If we accepted this argument, violators of the Constitution could avoid their remedial responsibility through manipulation of their budgets, leaving victims without redress. Simply put, parsimony is no barrier to a constitutional remedy; "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis,* 373 U.S. 526, 537 (1963).

731 F.2d at 1308.

Most important for our purposes, *Liddell VII* considered and rejected the State's argument that its duty to fund the transfer program violates the Eleventh Amendment. The Eighth Circuit held:

> The district court's funding order poses no Eleventh Amendment problems. The State relies on *Edelman v. Jordan,* 415 U.S. 651, 663 (1974), to avoid its liability for a remedy that requires the expenditure of state funds where that remedy is allegedly overbroad. The Supreme Court in *Milliken II* applied the prospective compliance exception developed in *Ex parte Young,* 209 U.S. 123 (1908), which "permits federal courts to enjoin state officials to conform

> their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken II, supra,* 433 U.S. at 289. After elucidating the three criteria discussed earlier, the Supreme Court in *Milliken II* found that the plan under review there was constitutional. The interdistrict transfer plan under consideration in this case conforms to the same three criteria.

Liddell VII, 731 F.2d at 1308-09 n. 13.

The State filed its third certiorari petition on April 20, 1984, seeking review of *Liddell VII.* There, as here, the State questioned "whether . . . a federal court may require a state to fund a Settlement Agreement drafted by other parties" (Pet. No. 83-1721 at i).[7] There, as here, the State complained that the Settlement Agreement "wrongfully drained state funds. Even more serious, however, is the fact that it seriously distorts the way in which decisions about state programs should be made" (Pet. No. 83-1721 at 23). The State's 1984 petition, like the pending one, complains that the Settlement Agreement was never signed by the State and that it is "a settlement plan imposed by judicial force on a non-settling party" (Pet. No. 83-1721 at 12 & 14). Finally, the State's petition argued that the Eighth Circuit erred in applying the "law of the case" doctrine (Pet. No. 83-1721 at 22 n. 20). This Court denied certiorari on October 1, 1984. 469 U.S. 816.

The voluntary City-County student transfer program has been a highly successful, if not the most successful, element of the St. Louis school desegregation remedy. The Eighth Circuit

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[7] Unlike the instant petition, however, the State's 1984 petition questioned "whether . . . a federal court may require a state to *implement* a multi-district remedy for segregation . . ." (Pet. No. 83-1721 at i). The State's present argument, which contradicts its previous position, is that it has not been ordered to "implement" anything but, rather, is merely subject to a "naked order to pay."

commented in 1984, when it approved the Settlement Agreement, that "the opportunity for effective integration became a reality when the county schools agreed to accept the voluntary transfer of several thousand black students." *Liddell VII,* 731 F.2d at 1306. In 1986 the Eighth Circuit provided an update:

> [S]ignificant progress towards integration has been made. In the school year 1985-86, nearly 7,000 black students from the City of St. Louis attended schools in the suburban schools. Most students who transferred have remained in the school to which they have transferred. Ninety-two percent of them were promoted to the next highest grade in the school that they were attending.

Liddell v. Board of Education, 801 F.2d 278, 280 (8th Cir. 1986) ("*Liddell IX*"). Most recently, in *Liddell v. Board of Education,* ____ F.2d ____ (8th Cir. No. 87-2445, 7/14/88), the court noted that approximately 12,000 black City transfer students are voluntarily enrolled in county schools, and the number is expected to increase in the 1988-89 school year. Sl. Op. at 3. "The high level of city to county transfers has been achieved, even though 26% of the city students transferring to the county are required to spend more than two hours a day on a school bus." *Id.* Citing data, the Eighth Circuit observed that "black parents and black students appear to give strong support to the program" and "black students attending county schools are doing better scholastically than they were before this Court's en banc order of 1983." *Id.* at 4.

As of this writing, 21 of 23 St. Louis County school districts have reached the racial goals required under the Settlement Agreement. These 21 districts, including respondent Ritenour School District, have applied for and received final judgments from the district court declaring satisfaction of their desegrega-

tion obligations.[8] The remaining two districts, with plaintiffs' consent, have been granted a two-year extension to meet their goals and qualify to receive final judgments.

B.

Ritenour's Budget Request And The Decisions Below

Ritenour was compelled to reopen the Buder Elementary School to accommodate the influx of black transfer students to Ritenour under the Settlement Agreement. Buder had previously been closed at a time of reduced enrollment in the district. Pursuant to procedural orders entered by the district court, and X.B.3.'s provision allowing recovery of "the costs associated with reopening a closed school," Ritenour filed a budget request seeking partial reimbursement from the State of the cost of reopening Buder. The budget request was submitted to the Budget Review Committee ("BRC"), a standing committee appointed by the district court in the desegregation case. Pursuant to court order, the State has two permanent voting members on the BRC and the County districts are unrepresented on the committee.

The total estimated cost of reopening Buder was $587,000, an amount conceded by all parties to be "very cost-effective." Ritenour voluntarily limited its budget request to $290,565, however. The BRC recommended that the State pay Ritenour only $108,783 and the district court accepted that recommendation. Ritenour appealed to the Eighth Circuit. The State, which at all times had contended that its funding obligation was negligible or zero, did not appeal.

On appeal, the Eighth Circuit accepted most of Ritenour's arguments regarding financial aspects of the budget request,

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[8] Notwithstanding their final judgments, these districts have continuing obligations under the Settlement Agreement with regard to the recruitment, acceptance and promotion of transfer students. See §XII.D. of the Settlement Agreement (Pet. Appx. A226).

and directed the State to reimburse Ritenour $267,300 for the reopening of Buder. Neither in its appellate brief nor at oral argument did the State make any of the sweeping Eleventh Amendment arguments it now makes in its certiorari petition. The State's sole reference to the Eleventh Amendment pertained to a small group of costs, including expenditures to repair Buder's leaking roof, that Ritenour had incurred prior to submission of its budget request to the BRC. The State's brief argued, in one short paragraph, that such expenditures "constitute[d] a form of retroactive compensation barred by the Eleventh Amendment," citing *Edelman v. Jordan,* 415 U.S. 651, 663 (1974). Until it filed its petition for rehearing, the State at no time suggested that Ritenour's entire budget request and, indeed, all of the State's funding obligations under the Settlement Agreement, violated the Eleventh Amendment.[9]

The Eighth Circuit rejected the State's limited Eleventh Amendment argument:

> The relief in issue here is prospective. The St. Louis school desegregation case is in the remedial stage. The failure of the State to pay Ritenour for the roof repair in question is not a past wrong for which Ritenour is attempting to hold the State liable. Rather, it is a question of what the State must do *now* to conform its actions to the remedial relief

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[9] Prior to its petition for rehearing, the State made no Eleventh Amendment argument at all with respect to Rockwood School District's budget request. As to respondent Rockwood, the decision below neither makes nor affirms any monetary award against the State. It merely holds that the language "one-time extraordinary costs" in X.B.3. does not limit a County school district to one budget request (as the district court had held), and remands to the district court for consideration of and a ruling on Rockwood's second budget request. It should be noted that the State did not appeal the district court's earlier order (in 1984) approving Rockwood's first X.B.3. budget request. The State acquiesced in that ruling and made the payment to Rockwood as directed by the district court.

> already required. Thus, there is no Eleventh Amendment bar to this payment for past roof repairs.

Liddell v. Board of Education, 839 F.2d 400, 404 (8th Cir. 1988) (emphasis in original). The court also noted its prior rejection of the State's Eleventh Amendment argument in *Liddell VII,* 731 F.2d at 1308 n. 13, *cert. denied,* 469 U.S. 816 (1984). *See* 839 F.2d at 404.

The state filed a motion for rehearing and rehearing en banc, raising for the first time in these proceedings the contention that the Eleventh Amendment bars all payments by the State under the Settlement Agreement. Rehearing was denied by the Eighth Circuit on March 14, 1988.

REASONS FOR DENYING THE WRIT

I.

The Decision Below Is Consistent With *Milliken II* And Other Decisions Of This Court

At issue in *Milliken II,* 433 U.S. 267 (1977), as here, was the question whether a state found to be liable in a school desegregation case may be ordered to fund the costs of the remedy without violating the Eleventh Amendment. More specifically, the question was whether the Eleventh Amendment proscribed an order requiring the State of Michigan "to pay about $5,800,000 *to the Detroit School Board.*" *Id.* at 293 (Powell, concurring) (emphasis added). This Court held that requiring Michigan to make such a payment did not violate the Eleventh Amendment.[10]

The only analytical difference between *Milliken II* and the decision below is that the Detroit School Board was an adjudicated constitutional violator (along with the State of Michigan) whereas Ritenour is not. This distinction, however, makes the correctness of the decision below *a fortiori.* Obviously, Ritenour's *lack* of culpability makes the State of Missouri's Eleventh Amendment argument even less tenable than the one made and rejected in *Milliken II.*

This Court's reasoning and holding in *Milliken II* are thus directly in point and fatal to the State's contentions in the petition at bar. *Milliken II* held that state-ordered funding of the remedy in a school desegregation case is necessarily "prospective" and accordingly is not proscribed by the Eleventh Amendment:

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[10] The State of Missouri's argument that the Eleventh Amendment prohibits a court from requiring a state to pay money to one of its own political subdivisions has thus been squarely rejected by this Court. *Milliken II* specifically approved an order requiring the payment of money by Michigan "to the Detroit School Board."

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, 209 U.S. 123 (1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U.S. at 667. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a *de jure* segregated school system. More precisely, the burden of state officials is set forth in *Swann* — to take the necessary steps "to eliminate from the public schools all vestiges of state-imposed segregation." 401 U.S. at 15. The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual system long maintained by Detroit.
>
> . . . That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.

Milliken II, 433 U.S. at 289-90 (emphasis in original).

The Court emphasized the difference between a school desegregation remedy and a case, like *Edelman*, where individual citizens seek money damages for actions and consequences completed in the past:

> Unlike the award in *Edelman*, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition. Thus, the injunction here looks to the future, not simply to presently

> compensating victims for conduct and consequences completed in the past.
>
> . . . .
>
> In contrast to *Edelman,* there was no money award here in favor of respondent Bradley or any members of his class. This case simply does not involve individual citizens' conducting a raid on the state treasury for an accrued monetary liability. The order here is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

Milliken II, 433 U.S. at 290 nn. 21 & 22. The Court also rejected Michigan's arguments, which are parroted in the State's instant petition, that the funding order violated "principles of federalism" and was tantamount to a forced "restructuring" of state governmental entities and their methods of financing. *Id.* at 291.

The principles announced in *Milliken II,* which this Court reaffirmed in *Papasan v. Allain,* 106 S.Ct. 2932, 2942-43 (1986), speak directly to the case at bar. The voluntary City-County transfer program was established, in a variety of past court decisions no longer subject to review, to reduce the ongoing vestiges of discrimination in the City's schools. The program was and remains "prospective" — designed to benefit current and future black City students. The purpose of reopening Buder Elementary School, specifically, is to enable black City students to attend integrated schools (in the County) now and in the future.

The State's duty to reimburse Ritenour's costs was fixed in 1983, when Ritenour and the other County school districts agreed in the Settlement Agreement to accept transfer students, and thereby to assist in remedying the State's constitutional violations, *upon the condition* that their future costs of accepting students would be reimbursed. The county districts then

went *forward* in providing integrated learning opportunities for black City students. It is the cost of those forward-looking remedial steps, not anything that occurred in the past, for which Ritenour sought state reimbursement in its budget request under Section X.B.3. of the Settlement Agreement.

Even Ritenour's pre-request expenditures for roof repairs — which were incurred *after* the Settlement Agreement had been approved and *after* Ritenour had committed itself to the education of black City students in such numbers as made the reopening of Buder inevitable — was plainly "prospective" for Eleventh Amendment purposes. The roof was repaired with the intent, purpose and effect of preserving the building, so that it could be reopened in the following year (at the least possible cost to the State and Ritenour) to accommodate the influx of City transfer students. State reimbursement of the roof repair was thus entirely proper under *Milliken II,* as the Eighth Circuit below correctly held.

II.

There is No Conflict Between the Decision Below and the Sixth Circuit's Decision in *Kelley v. Metropolitan Board of Education of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 2848 (1988).

The St. Louis school desegregation case is fundamentally different from the case considered by the Sixth Circuit in *Kelley v. Metropolitan County Board of Education of Nashville and Davison County*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 2848 (1988).[11] Unlike the State of Tennessee in *Kelly*, the State of Missouri was an adjudicated constitutional violator (along with City Board) from the very outset of the remedial phase. It was subject to direct, substantive remedial orders from day one. Paragraph 12 of the district court's 1980 order directed the State of Missouri to implement a voluntary student transfer plan with the cooperation of the St. Louis County school districts. The State participated in the negotiations that culminated in the establishment of just such a program. The State was thereafter ordered in a string of court decisions (no longer subject to review) to *implement* and *fund* the transfer program. The State's payment to Ritenour is indisputably part and parcel of that transfer program.

Kelley involved a third-party complaint filed by the Metropolitan Board of Education of Nashville and Davidson County ("Metropolitan Board") against the State of Tennessee. In stark contrast to the decision below, Tennessee had not

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[11] Moreover, the case at bar would be a particularly inappropriate vehicle to address a purported conflict with *Kelley* because neither the *Kelley* decision nor the particular analysis advanced therein is discussed in the opinion below.

previously been a party in the case.[12] *Kelley,* 836 F.2d at 989. The Metropolitan Board sought "indemnification" from Tennessee for the Board's costs of desegregation remedies that it had been ordered to carry out as far back as 1971. *Id.* at 987 & 1000. The remedial programs for which Metropolitan Board sought state reimbursement had already been put into effect, long before the attempt was made to bring Tennessee into the case. *Id.* at 989-90. The Sixth Circuit found that the monetary sums sought from Tennessee were purely "retroactive" and not "ancillary" to any affirmative injunctive relief ordered against the state, and that payment thereof would therefore violate the Eleventh Amendment.

The procedural posture in *Kelley* thus differed in critical respects from the present case. The State of Tennessee, unlike the State of Missouri, was not even in the case at the time the remedies were implemented for which the "indemnification" was sought. Furthermore, the Sixth Circuit emphasized in *Kelley* that there was no evidence supporting any current constitutional liability on the part of the State of Tennessee, which is the antithesis of the State of Missouri's status in the case at bar. *See* n. 12. The two cases are thus plainly distinguishable, and no conflict exists between them.

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[12] It is not at all clear from the opinion whether the Sixth Circuit even considered Tennessee to be a constitutional violator in the case:

> It bears emphasis that we are not here called upon to adjudicate the rights of plaintiffs suing to obtain the equal educational opportunities promised them in *Brown v. Board of Education*. . . . Those plaintiffs have long since won their case. They won it *without ever having asserted any claim against the state.*

Kelley, 836 F.2d at 989 (emphasis added); *see also id.* at 993 ("we have searched the record of this case in vain for any demonstration that the integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s") & at 995 ("the record in this case simply does not show that the State of Tennessee is currently a participant in any constitutional violation").

III.

The State's Duty to Fund the Voluntary Transfer Program Is Settled "Law of the Case" in the Courts Below and Should Not Be Subjected to Reexamination

The Eighth Circuit has on four prior occasions upheld the validity of the State's duty to fund the voluntary student transfer program. *See Adams, Liddell II, Liddell V & Liddell VII, supra.* In *Liddell VII,* the State's Eleventh Amendment argument was expressly considered and rejected, and the State's certiorari petition was denied by this Court. Moreover, *Liddell V* and *Liddell VII,* in each of which certiorari was denied, explicitly held that the law of the case doctrine applied and barred the State's further attempts to relitigate the funding issue. The same salutary policies underlying that doctrine call for this Court's denial of the State's present petition. "[W]hen an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting, Refining and Mining Co.,* 339 U.S. 186, 198 (1950).

Reversal of the long-settled determination that the State is obligated to fund the transfer program would have serious adverse consequences for the desegregation remedy in place in St. Louis. If the State were no longer obligated to fund the transfer program, the County school districts, under the express provisions of Section X of the Settlement Agreement, are no longer obligated to accept and educate transfer students (nor would they have the resources to do so). Thousands of black City transfer students who have found a "home" in the County schools would stand in jeopardy of not being able to complete their education in those schools. The program that is widely regarded as the most successful element of the St. Louis school desegregation remedy would in all likelihood come to an end. For compelling reasons of fairness and repose, the State's settled duty to fund the voluntary City-County transfer program should not be subjected to reexamination.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1987

STATE OF MISSOURI, *et al.*,

Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, *et al.*,

and

RITENOUR SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT ROCKWOOD SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The beginning of the Petitioner's presentation to this Court, which states that this "is not a case about desegregation" (Pet. at 1), is unfathomable. The issue presented by the State of Missouri ("State") goes to the heart of the St. Louis School desegregation case which began 16 years ago and has painstakingly progressed ever since. If the position of the State is accepted, it would most likely trigger the withdrawal of the twenty-three (23) St. Louis County ("County") school districts from the desegregation plan under which the County districts volunteered to accept black transfer students from the City of St. Louis ("City") school district. The reason such withdrawal would likely occur is because such voluntary participation is dependent upon the express condition that adequate funding be provided pursuant to the Settlement Agreement (Section X) which created the plan. (For Section X, see Pet. Appx. A218 et seq.).

Subsequent to such statement by Petitioner, its Statement of the Case proceeds to depict an incomplete picture of this desegregation case, especially relative to the questions presented. The Statement of the Case proffered by fellow Respondent Ritenour School District ("Ritenour") in its Brief in Opposition is much more germane to the issues at hand, and this Respondent accepts Ritenour's statement as much more appropriate herein. In an effort at brevity and avoidance of duplication of Ritenour's statement, this Respondent shall limit its statement to general highlights of this complex case and particular facts relevant to this Respondent and the proceedings leading to the opinion of the Eighth Circuit from which the Petition herein arises.

A.

A Partial History of the St. Louis Desegregation Case

In 1980, the State, along with the St. Louis City School Board ("City Board"), was found to be the primary constitutional violator relative to the racial segregation in the City schools. *Adams v. United States,* 620 F.2d 1277 (8th Cir. 1980), *cert. denied,* 449 U.S. 826 (1980). The case was remanded to the District Court to "take those steps necessary to bring about an integrated school system" and "seek the cooperation of" the suburban school districts of St. Louis County to perhaps develop and implement "a comprehensive program of exchanging and transferring students with the suburban school districts." *Adams,* 620 F.2d at 1295 and 1296. The State did not file a certiorari petition relative to this decision. This Respondent Rockwood School District ("Rockwood"), like all of the other suburban school districts, was not a participant in the desegregation case at this point. Neither Rockwood nor any other suburban school district has *ever* been found liable for any constitutional violation in the St. Louis desegregation case.

On such remand, the District Court held that the State, as primary constitutional wrongdoer, must "affirmatively participate in remedial efforts . . . including the provision of funding, to the extent necessary, for the desegregation efforts ordered by the Court." *Liddell v. Board of Education,* 491 F.Supp. 351, 360 (E.D.Mo. 1980). Finding the State "jointly and severally liable with the Defendant Board for the costs," the District Court ordered the State and City Board to attempt to work with the suburban

school districts to develop "a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis." *Liddell*, 491 F.Supp. at 357 and 353. In its appeal to the Eighth Circuit, the State objected to its funding obligations in general and, specifically, for the suburban transfer program. The Eighth Circuit rejected the State's funding arguments stating that such issues were specifically decided previously in *Adams*, and the State failed to thereupon take those issues up to this Court. *Liddell v. Board of Education*, 667 F.2d 643, 654 (8th Cir. 1981) ("*Liddell II*").

In its first certiorari petition to this Court, the State challenged its funding obligation as confirmed in *Liddell II* and as set forth in *Adams*. That Petition, similar in nature to the instant Petition, was denied. 451 U.S. 902 (1981).

Following *Liddell II*, the District Court entered an order specifically authorizing the City-to-County transfers and requiring the State to pay the costs thereof. The State again appealed such finding, and the Eighth Circuit again rejected the State's funding objection, as the matter had been previously and extensively litigated, settled and established by *Adams*, *Liddell II*, and this Court's denial of certiorari review. *Liddell v. Board of Education*, 677 F.2d 626 (8th Cir. 1982) ("*Liddell V*"). Again the State applied to this Court for review, which application was similar to the petition previously denied in 1981 and the instant Petition. Likewise, this Court denied that petition for certiorari. 459 U.S. 877 (1982).

Shortly thereafter, following intense negotiations and drafting sessions in which the State, the Plaintiffs, the City Board and all of the suburban school districts participated, there was submitted to the District Court a Settlement Agreement executed by all of the said participants except the State, the Settlement Agreement being contained in Petitioner's Appendix at A135, *et seq.* In response to the Eighth Circuit and District Court directions discussed previously, the Settlement Agreement established a transfer plan whereby the suburban school districts agreed to accept and educate those black students from the City who elected to transfer to the County. As the suburban districts have never been found liable for any wrongdoing, and as their agreement to accept City students was to assist the State and City Board to remedy the constitutional violations committed by the State and City Board, such agreement and participation was and is strictly contingent upon the suburban districts receiving full reimbursement of their costs which are incurred as a result of acceptance of the City transfer students, as set forth in Section X of the Settlement Agreement. (Pet. Appx. A218 *et seq.*). In approving the Settlement Agreement, the District Court ordered the State to fund all of the costs of the suburban transfer program.

The State again appealed, and the Eighth Circuit again rejected the State's challenge of its funding obligation. *Liddell v. State of Missouri,* 731 F.2d 1294 (8th Cir. 1984) (*"Liddell VII"*). In so doing, the Eighth Circuit examined extensively the same Eleventh Amendment issue which the State argues in this Petition, and flatly rejected the same. *Liddell VII,* 731 F.2d at 1308. Filing its third certiorari petition, the State again sought review of the

repeated rejection of the State's funding argument in *Liddell VII*, which petition was again remarkably similar in most respects to the instant Petition. Again, this Court denied certiorari. 469 U.S. 816 (1984).

B.

Rockwood's Capital Budget Requests and the Decisions Below

One portion of the settlement Agreement provides for the payment of certain capital costs incurred by the suburban districts as a result of the need for additional space due to the influx of transfer students from the City. Obviously, as the incoming City transfer students increase the student population of a suburban school district, the number of classrooms in that suburban school district would need to be increased, either by reopening closed classrooms or building new ones if the district has no closed classrooms. The provision in question, contained in Section X.B.3. of the Settlement Agreement, provides funding for "one-time extraordinary costs (other than hiring of personnel) such as the costs associated with reopening a closed school." (Pet. Appx. A220).

In St. Louis County, there were and are basically two types of suburban school districts, either expanding districts or contracting districts. The expanding districts are located in the outlying, formerly rural, partially undeveloped but now developing areas of the County. New housing developments cause increased population, generally younger child-rearing residents, and a resulting continual increase in the student population. The contracting districts are generally located in areas in closer proximity to the City, and are more established, fully devel-

oped and with little or no new housing. Such areas generally experience less resident mobility and, therefore, a gradually aging population with a declining number of students. As a result of these changes in student population, expanding districts generally found themselves at capacity in newer buildings at or shortly after the inception of the City-to-County transfer plan while contracting districts generally were at or under capacity in older buildings with closed classrooms and schools in their district. Therefore, with additional City students coming into the suburban district, an expanding district would need to build more new buildings, and a declining district could reopen closed buildings.

Being one of the outermost and most rapidly expanding suburban districts, soon after the commencement of the voluntary transfer program under the Settlement Agreement it was necessary for Rockwood to file a budget request in the District Court for construction of additional classrooms. It was the first such request filed in the case. Rockwood's request followed the proper budgetary procedure established by the District Court, in which the State participated, and in 1984 the District Court entered an order approving Rockwood's capital budget request and directing the State to fund the same. In complete compliance with said order, the State paid Rockwood the cost of such capital improvements. The State did not appeal or otherwise object to such funding. With said funding, Rockwood proceeded to construct the new classrooms.

The student population of Rockwood continued to expand and Rockwood continued to accept a greater num-

ber of City transfer students into its district. As a result, in 1986 it was necessary for Rockwood to file a second capital budget request in the District Court, this time for construction of ten new classrooms to be added to existing school buildings. Prior to completion of the normal budgetary process, the District Court entered an order which gave rise to Rockwood's appeal to the Eighth Circuit, and the State's instant Petition for Certiorari. The order of the District Court, entered August 25, 1986, denied Rockwood's budget request on the basis of an interpretation of the language of Section X.B.3., holding "one-time extraordinary costs" to mean that a suburban school district could apply only once for capital costs.

Rockwood appealed to the Eighth Circuit contending that "one-time" clearly describes the *type* of costs and did not, and was never intended, to limit the number of times such an application could be made. Throughout the briefing and argument of the appeal by both Rockwood and the State, the issue on appeal was strictly limited to the meaning of the words "one-time" in the Settlement Agreement. Prior to the rendering of the Eighth Circuit opinion below, *the State never raised an Eleventh Amendment argument*, in the District Court or the Eighth Circuit, relative to Rockwood's capital budget request. The Eighth Circuit reversed the District Court's denial of Rockwood's request, holding that multiple capital budget requests were allowed and provided for under the clear language of the Settlement Agreement, and remanded to the District Court to proceed on the request, which the District Court has subsequently allowed in full. In its motion for rehearing and rehearing en banc before the Eighth Circuit, the State raised *for the first time* its con-

tention that the payment of Rockwood's budget request was barred by the Eleventh Amendment. The State's motion for rehearing was denied by the Eighth Circuit.

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REASONS FOR DENYING THE WRIT

I.

The State Failed to Properly Present Its Eleventh Amendment Argument to the Courts Below

For whatever reason, the State failed to present to the District Court any argument or objection to the capital budget request of Rockwood based upon the Eleventh Amendment to the United States Constitution. Instead, the State chose to be silent relative to the Eleventh Amendment and allowed the District Court to base the denial of Rockwood's request solely upon an interpretation of the language of the Settlement Agreement, an argument which the Eighth Circuit found to be incorrect.

Before the Eighth Circuit, the State again was *totally* silent as to the Eleventh Amendment issues in its responsive brief and in its oral argument relative to the Rockwood request. It was only *after* the issuance of the Eighth Circuit's opinion that the State *first* raised the issue in its motion for rehearing, that the Rockwood request was barred by the Eleventh Amendment. In fact, the Eighth Circuit opinion below specifically held that there was no Eleventh Amendment bar to a small group of costs requested by the other Respondent herein, Ritenour. *Lid-*

dell v. Board of Education, 839 F.2d 400, 404 (8th Cir. 1988). The motion for rehearing was denied.

Perhaps more importantly, when the District Court granted Rockwood's first capital budget request in 1984, the State made no objection thereto, based upon the Eleventh Amendment or any other basis. The State instead simply supplied the funding for that request as ordered by the District Court. By so doing, the State consented to and acquiesced in its obligation to fund capital budget requests of the suburban school districts in general, and Rockwood in particular. The State thereby waived any Eleventh Amendment argument, if such an argument could have existed at all.

This Court is hardly the proper forum for any party to address substantive issues, such as those presented by the State herein, for the first time. Such issues must be fully presented and litigated in the courts below before being presented to this Court. As the Petitioner had not one but two opportunities to present the issues below, and in effect waived the issues at its first opportunity four years ago, this Respondent respectfully suggests that the instant Petition should be summarily denied.

II.

The Time for the State to Attack Its Funding Obligation has Expired and the Issue has Long Been Resolved

Sixteen years ago this case began. Eight years ago, the State, having been found a primary constitutional violator, was ordered, in conjunction with the City Board, to remedy such violation and provide funding for such remedy in general, and the suburban transfer program in par-

ticular. What has followed has included thousands of proceedings in the District Court, including hundreds of funding orders directed to the State, and at least fifteen appeals to the Eighth Circuit. In addition, the State has petitioned this Court for certiorari on three occasions, specifically seeking review of its funding duty, and on each occasion has been denied. In response to the repeated appeals by the State to the Eighth Circuit seeking relief from its duty to fund, the Eighth Circuit has repeatedly stated that since *Adams v. United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980), the issue had been thoroughly argued, considered and decided adverse to the position of the State. As it was the clear law of the case, the State was precluded from rearguing and relitigating the matter as the issue was conclusively resolved.

The waiver and acquiescence by the State relative to Rockwood's first capital budget request in 1984 is but one more indication, particularly appropriate for Rockwood, that the State is too late to present its Eleventh Amendment argument to this Court. In fact, it is much more than a simple matter of missed opportunity on the part of the State, since the previous three certiorari petitions filed by the State herein have each squarely presented to this Court the State's objections to its duty to fund.

The practical aspects of the potential effect of the State's argument, although ancillary to the legal procedural barriers to the instant Petition, are nevertheless equally significant. In a case where millions of dollars of funds have already been expended to remedy the segregation problem in the City schools, by the assistance of the

suburban schools for the past five years, and for a longer time period in the City schools themselves, an abrupt cessation of State funding at this point would be catastrophic to the desegregation plan in St. Louis. Transfers of City children to the County districts would end entirely and, presumably, those children (more than 12,000 in number), many of whom have attended their new "home" County district for several years, would be abruptly thrust back into the City school district from whence they came. Not only would such an onslaught of children be an immediate problem for the City Schools, but withdrawal of State funding to the City Board would effectively cripple the City's desegregation efforts. The St. Louis desegregation program has been established and set on its course to remedy a wrong, it should not be derailed by the State in this fashion.

III.

The Decision Below is Not in Conflict with the Decision of Any Other Federal Court of Appeals

The State contends that the decision below is in conflict with a decision of the Sixth Circuit, namely *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee,* 836 F.2d 986 (6th Cir. 1987), and, therefore, should be reviewed by this Court. Such contention is simply inaccurate—*Kelley* is clearly distinguishable, in crucial aspects, from this case.

First and foremost, in *Kelley*, the Metropolitan Board of Education of Nashville and Davidson County ("Metropolitan Board") was first found to have violated the Constitution by its segregation and ordered to remedy the problem, and only *thereafter* brought the State of Ten-

nessee into the case to help fund the remedy. The State of Tennessee was *not* subject to that original remedial order. In fact, the Sixth Circuit was unable to find that the State was guilty of any wrongdoing (*Id.* at 993) or was a constitutional violator (*Id.* at 995). In the instant case, as discussed in more detail hereinabove, the State and the City Board were *originally* and *together* found to be constitutional violators and were *together* ordered to remedy the violation. After the State participated in the process which ultimately resulted in development of that remedy, the State was directed to implement and fund portions of that remedy.

Another important distinction between *Kelley* and the instant case, likewise fatal to the State's contention, is the difference in the recipients of the funding in the two situations. In *Kelley*, it was the urban school district who was originally adjudicated the only constitutional violator and in whose district the violations occurred. In the instant case, it is suburban school districts, not adjudicated violators, who have agreed to assist in the remedy of the State's constitutional violation which occurred outside of the recipient suburban school district, to-wit: in the school district of the City of St. Louis.

Finally, the State's attempt to characterize its funding obligation in the instant case as a "naked order to pay" is simply inaccurate. As described in detail hereinabove and in Respondent Ritenour's brief herein, from the beginning the State was clearly found to be guilty of constitutional violations and was ordered "to affirmatively participate in remedial efforts . . . including the provision of funding, to the extent necessary, for the desegregation efforts ordered by the Court." *Liddell v. Board of Edu-*

cation, 491 F.Supp. 351, 360 (E.D.Mo. 1980). The State itself, in its previous certiorari petitions to this Court has taken a position contradictory to its "naked order to pay" theory presented for the first time in the instant Petition. In the 1982 petition, the State challenged the decision "ordering the State to participate in an inter-district remedy" (Pet. No. 81-2022 at p. 10) (*cert. denied*, 459 U.S. 877). Again in 1984, the State Petition posed the question of whether "a federal court may require a state to *implement* a multi-district remedy for segregation." (Pet. No. 83-1721 at i) (*cert. denied*, 469 U.S. 816). The State has obviously been ordered to do much more than supply funds.

IV.

The Decision Below is Consistent with Previous Decisions of This Court, and the Questions Presented Have Already Been Rejected by This Court

The State's Petition attempts to establish that the decision below is contrary to "controlling decisions" of this Court relative to the Eleventh Amendment. Curiously, the State fails during the course of that argument to mention this Court's opinion in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). Perhaps such omission by the State is not surprising, as the decision below is squarely supported by and consistent with *Milliken II*.

Milliken II has not only been cited repeatedly by the Eighth Circuit and the District Court below throughout the course of this desegregation case, but has also been strictly applied and followed by the courts below. The repeated reference to *Milliken II* by the courts below has been particularly appropriate because of the similar circumstances

in *Milliken II* and in this case, i.e. in both instances a State, found liable in a school desegregation case, has been ordered to fund the remedial costs thereof. In both instances, such funding was found not to violate the Eleventh Amendment. The instant case is even farther removed from violating the Eleventh Amendment than the circumstances of *Milliken II* in that the recipient of the state funding in *Milliken II* was an adjudicated constitutional violator (the Detroit School Board) whereas the recipient herein is not (Rockwood).

Edelman v. Jordan, 415 U.S. 651 (1974) (*"Edelman"*), which was cited by Petitioner, is patently distinguishable from the instant case for Eleventh Amendment purposes in that in *Edelman* the plaintiffs receiving funds were individual citizens seeking money damages for themselves. In the instant case, the Plaintiffs are black students from the City seeking a remedy to school segregation rather than money damages for themselves, and the State funding is going to the suburban school districts assisting the State in its remedial duties. *See Milliken II*, 433 U.S. 267, 290 n. 22 (1977). Far from being inconsistent with the instant case, *Edelman* reaffirms the prospective-compliance exception applicable in the instant case and which was established in *Ex parte Young*, 209 U.S. 123 (1908).

The State's contention, that funding orders directed to the State in favor of one of its own political subdivisions violate the Eleventh Amendment, has been rejected repeatedly by this Court. It was rejected expressly in *Milliken II* and by implication from this Court's repeated denials of the State's previous certiorari petitions herein.

V.

The Decision Below Does Not Violate the Eleventh Amendment

Lost in the lengthy argument of the Petitioner herein is a simple fact—*the decision below did not order any funding to Rockwood by the State.* Relative to Rockwood, the decision below merely held that pursuant to the clear language of the Settlement Agreement the District Court erred in barring the *application* of Rockwood for a second capital budget request. The Eighth Circuit remanded the matter to the District Court for further consideration of Rockwood's request. Without an order to fund, there can be no possible violation of the Eleventh Amendment as argued by the State.

Also, as has been argued hereinabove, the directives against the State in the St. Louis desegregation case have been remedial, and not purely financial. No money damages have gone from the State to the Plaintiffs. Rockwood, the potential recipient of the State funds, is not a party-plaintiff with respect to the State and is not a constitutional violator. Under the clear holding in *Milliken II* and the cases which have followed, and for the foregoing reasons, the decision below does not violate the Eleventh Amendment to the U.S. Constitution.

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CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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